

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION
PETITIONER

vs.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE
SOUTH UTILITIES, INC., AND LOUISIANA POWER
& LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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Before the Securities and Exchange Commission

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COM-
PANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW ORLEANS,
PUBLIC SERVICE, INC., RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY,
LOUISIANA GAS SERVICE CORPORATION

(File No. 70-3315)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY

(File No. 31-620)

(Public Utility Holding Company Act of 1935)

Offer of proof

Filed May 2, 1955

I

PRELIMINARY STATEMENT

Under date of November 13, 1954, Louisiana Power & Light Company (herein called Louisiana) filed application to Louisiana Public Service Commission (herein referred to as the Commission) for approval of a proposed plan for disposition of its non-electric properties through the formation of a subsidiary

company to which these properties would be transferred. Louisiana had previously filed its Application-Declaration with the Securities and Exchange Commission (herein sometimes called SEC) under date of November 10, 1954, and the matter was then pending, Securities and Exchange Commission File No. 70-3315 and File No. 31-620. Under date of December 22, 1954, the Commission sent a telegram to the Securities and Exchange Commission requesting a public hearing in that matter, and also requesting the reopening of File No. 59-100 and File No. 54-139, and for a hearing at the same time for the purpose of receiving additional evidence in these files. Under date of December 23, 1954, the Commission dispatched to the SEC its letter of that date, enclosing the formal petition of the Commission and asking for a hearing in the above files. Under date of December 31, 1954, the Commission dispatched its letter bearing that date, forwarding its supplemental petition to the SEC. The Commission is advised that under date of December 31, 1954, Louisiana sent to the SEC a letter stating that Louisiana had no objection to the reopening of proceedings in File No. 59-100 and File No. 54-139. Under date of January 21, 1955, the SEC advised the Commission by letter that the SEC would entertain an offer of proof and brief if filed on or before March 1, 1955, setting out that on or before March 21, 1955, the Division of Corporate Regulation (of SEC), Louisiana Power & Light Company and Middle South Utilities, Inc. could submit proofs in support of or in opposition to the Commission's petition, and stating further that oral argument would be heard at 10 A. M. on March 28, 1955.

Under date of February 14, 1955, the Commission wrote to the SEC, requesting an extension of sixty days from March 1, 1955, within which to file its offer of proof and supporting brief. Enclosed in this letter was a letter from Louisiana, addressed to this Commission, advising that it had no objection to the requested extension of time. Under date of February 25, 1955, the Commission received a wire from the SEC advising that the SEC had extended until May 2, 1955, the time for filing the Commission's offer of proof and supporting brief, and had extended until May 23, 1955, the time for the filing of briefs

by other parties, and fixed oral argument for June 1, 1955, at 10 A. M.

II

AUTHORITY OF LOUISIANA PUBLIC SERVICE COMMISSION

Louisiana Public Service Commission is vested by the Constitution¹ and laws² of Louisiana with all necessary power and authority to regulate both electric and gas utility companies operating throughout the State of Louisiana, with the exception of certain municipalities which by law have the right to regulate such utilities within their corporate limits. In accordance with the Constitution of Louisiana,³ the Com-

¹ Article 6, P. 4, Constitution of 1921, provides:

"P. 4. Powers and duties of Service Commission.—The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls and charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts."

² Louisiana Revised Statutes, 1952, Title 45, Section 1161 et seq.

³ Article 6, P. 3, Constitution of 1921, provides:

"P. 3. Public Service Commission-Election-Salary and traveling expenses.—There is hereby created a Commission, to be known as the Louisiana Public Service Commission, which shall be composed of three members, who shall be duly qualified electors, to be elected from the districts hereinafter named, at the time fixed for the Congressional elections.

mission is composed of three Commissioners, one elected from each of the three public utility districts into which the State of Louisiana is divided, by the electorate of Louisiana, for six year overlapping terms, and is thus necessarily responsive to the will of the people of Louisiana.

The Commission has, and has exercised, jurisdiction over all the retail electric rates and gas rates of Louisiana Power & Light Company for residential, commercial, industrial, and governmental and municipal services, with the exception of electric rates for service in the 15th Ward of the City of New Orleans, which rates are subject to regulation by the City of New Orleans. All such rates are on file with the Commission, which includes the rates for all gas sold by Louisiana and for all electric energy sold by Louisiana outside of the City of New Orleans, with the exception of electric energy sold at the State line to other utilities, the rates for these sales being on file with the Federal Power Commission. The Commission requires Louisiana and other utilities to file annual reports, which show among other things the earnings for each year. By its Order No. 4346, dated July 29, 1946, the Commission has fixed the electric rate base of Louisiana Power & Light Company and has prescribed its allowable rate of return. Louisiana's electric accounts are classified in accordance with the Uniform System of Accounts prescribed by the Commission, and its gas accounts

No person in the employ of or holding any official relation to any common carrier or public utility under the control of said Commission, or owning any stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. The act of two members when in session shall be the act of the Commission.

The three members of the Railroad Commission of Louisiana in office upon the adoption of this Constitution shall be the members of the Louisiana Public Service Commission and shall serve out the terms for which they were respectively chosen. Upon the expiration of the term of each commissioner his successor shall be chosen for a term of six years. Until otherwise provided by the Legislature, the salary of each commissioner shall be three thousand dollars (\$3,000.00) per annum, payable monthly, on his own warrant. The Commission shall appoint a Secretary and fix his salary, and shall appoint such other employees as may be provided by the Legislature. The commissioners, their attorneys and employees shall receive actual traveling expenses when traveling on business for the Commission. The Commission shall have its domicile at the State Capital, but may meet, hold investigations, and render orders elsewhere in this State."

are classified in accordance with the NARUC System of Accounts.

III

GENERAL STATEMENT

As will be given in more detail hereafter, the Commission offers to prove the following:

(1) The gas system of Louisiana Power & Light Company cannot be operated as an independent system without the loss of substantial economies, which can be secured by the retention of such system by Louisiana Power & Light Company, which is a subsidiary of Middle South Utilities, Inc.

(2) Both the electric system and the gas system of Louisiana Power & Light Company are located entirely within the State of Louisiana.

(3) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

(4) No law of the State of Louisiana prohibits the ownership or operation by a single company of utility assets of an electric utility and a gas utility, and Louisiana has the express approval of this Commission to continue operation of both utility systems.

(5) The public interest and the interest of electric and gas consumers of Louisiana will best be served by the continued operation of both systems by Louisiana.

(6) It is the desire of the official governmental agencies in Louisiana concerned with the services which Louisiana renders, that Louisiana retain both electric and gas systems.

IV

(i) The gas system of Louisiana Power & Light Company cannot be operated as an independent system without the loss of substantial economies, which can be secured by the retention of such system by Louisiana Power & Light Company, which is a subsidiary of Middle South Utilities, Inc.

In support of this proposition, the Commission will offer to prove the following:

1. Attached hereto as Exhibit A is a statement of Louisiana's non-electric customers, sales and revenues for the year 1954. The Commission has, as a result of a great deal of time spent by its staff, caused a detailed separation study to be made of the results which would follow disposition by Louisiana of its non-electric properties and their operation as a separate system. Attached hereto, as Exhibit B, is a copy of this study with attachments in support thereof. The study shows that the total additional cost of such separation to Louisiana's utility customers would be \$957,193.00, of which \$684,377 would be additional cost to Louisiana's electric customers and \$272,816 would represent additional cost to the non-electric customers.

This separation study was made by taking the operations of the Company for the year 1954 and eliminating from the costs of operation all the expenses which could possibly be eliminated during that year if the gas operations had been eliminated. As seen by the attachments to Exhibit B, this study was made in detail not only in the General Office of the Company but at the Division Office and District Office levels. The resulting figure representing the actual cost of operating the electric properties alone during the year was found to be \$684,377 greater than the actual costs charged to electric operations during the year 1954.

The Commission considered several bases for estimating the cost of separate operation of the gas properties and consulted comparative figures of other companies operating separate gas properties. It also considered the study made by Ebasco Services (on file with SEC in files numbered 70-3315 and 31-620 as Exhibit B-15 to Louisiana's Application Declaration). This

latter study was made not in connection with this intervention by the Commission but for the purpose of enabling Louisiana to inform and interest prospective purchasers in these gas properties, the sale of which Louisiana contemplated in accordance with the order of the SEC.

Exhibit C hereto shows the comparative per customer cost of operation for the Mississippi Valley Gas Company for the year 1954 and the cost per customer for Louisiana as estimated by the Commission. According to statistics compiled by the Southern Gas Association, the average per customer cost of the two next larger and the two next smaller in size gas utilities, for the year 1954, was \$22.35. This compares favorably with the \$22.15 per customer cost used by the Commission in its estimate.

The Commission concluded that this study represented an objective and conservative estimate of the expenses of separate gas operation and based its estimates of the cost of such separate operations on this study. The cost of separate operations of gas properties when compared to the actual cost charged to gas during the year 1954 showed a total increase of operating expenses for the separate operations of \$155,981. The Commission study also developed that the gas properties operated separately would need approximately \$778,900 in additional capital expenditures over and above that required by continued combined operation. The Commission estimates that the carrying cost of this additional capital expenditure would amount to approximately \$116,835 per annum, which when added to the increased cost of operations of \$155,981 means a loss of economies totaling \$272,816 in the separate gas operation.

The Commission also determined that 29.26% of Louisiana's electric customers were also gas customers of Louisiana's so that 29.26% or \$200,249 of the additional cost of operating the electric properties would have to be borne by Louisiana's gas customers also.

2. In addition to the loss of substantial economies shown above, as a separate operation the gas system would have to bear the burden of increased cost of debt financing. Under date of October 27, 1954, Louisiana sold \$18,000,000 principal

amount of First Mortgage Bonds at public sale, at a net cost of money to the Company of 3.11% (see SEC File No. 70-3297). Under date of September 24, 1954, the Louisiana Gas Service Corporation, the company which Louisiana caused to be formed to acquire its non-electric properties, after private negotiation with four major insurance companies, obtained an offer to purchase its First Mortgage Bonds to be secured by the non-electric properties of Louisiana Power & Light Company when acquired, at a cost of money of 3.55%, this being the best offer it could obtain. These two prices were obtained at approximately the same time, and there was no substantial change in the bond market rate between those dates. From this it is seen that the cost of money to Louisiana operating the combined properties was 3.111%, whereas the cost of money to a company operating the gas properties alone would have been 3.55%, or a differential of .439%. This, when applied to the \$4,000,000 of bonds proposed to be initially issued by the gas company would mean an increased cost of money of \$17,600 per annum, increasing, as additional bonds are issued, to \$28,500 per annum should the additional bonds be sold to Connecticut Mutual as contemplated by the plan submitted to SEC by Louisiana. These calculations are set out on Exhibit D hereto. This represents permanent additional costs placed on the consumers of gas in Louisiana, and will increase as the properties grow.

This clearly demonstrable higher cost of first mortgage money which the separate gas operations would be required to pay indicates clearly that the cost of equity financing would also be in excess of the cost of such equity in the present combined operation. Although this added cost of equity financing cannot be exactly estimated, it is a certainty that there would be added cost in such equity financing, resulting necessarily in a higher required rate of return.

3. Examination of the sinking fund requirements of Louisiana's Bond Mortgage on the combined properties shows that a 1% annual appropriation over a thirty year period is required. The mortgage negotiated by Louisiana Gas Service (Exhibit B-3 to Louisiana's Application Declaration in Files Nos. 70-3315 and 31-620) shows that a 3% annual appropriation

over a twenty year period is required. Separate operation of gas, therefore, would appear to require three times the annual charge for sinking fund. This Commission believes that this could become an important adverse factor in determining the allowable rate of return for a gas utility operated separately. The larger sinking fund requirement would necessarily require larger ratios of equity financing, involving greater costs of money. It would also require more frequent financing and refinancing transactions, all of which would be costly to the Louisiana ratepayer.

4. Sales of natural gas are subject to great seasonal variation, and sales of electric energy are also variable, as shown by Exhibit E (See Chart). Comparing these sales, it will be seen that the two systems operated together tend to complement each other. This not only tends to make for a more balanced operation but, from a rate regulation point of view, more or less eliminates the necessity for this Commission giving consideration to such seasonal variations in fixing a rate of return.

There are also considerable variations from year to year in sales of gas, due primarily to variations of weather from year to year. The inclusion of the gas properties with the electric properties eliminates the necessity for this Commission adding to the allowable rate of return for gas a factor to compensate for this risk.

5. Further confirmation of the loss of substantial economies in the case of a separation of the properties is shown by Exhibit F (See Chart), which shows the electric per customer cost of service by Louisiana Power & Light Company, Arkansas Power & Light Company, and Mississippi Power & Light Company for the year 1949 and the year 1954. Figures with respect to Arkansas and Mississippi have been supplied to this Commission by Louisiana Power & Light Company, at the Commission's request.

During 1949, the Arkansas Power & Light Company, Louisiana Power & Light Company and Mississippi Power & Light Company had gas properties for the entire year. The Arkansas Company disposed of its gas property as of January 1, 1950,

and Mississippi disposed of its gas property at January 1, 1952.

For the year 1949, the last full year that these three companies had electric and gas service, and for the year 1954, a study of the electric operating expenses (total operating and maintenance expense less generation, transmission and power purchased expenses) reflects annual and increased costs per customer, as follows:

Company	Cost 1949	Cost 1954	Increased cost 1954 over 1949
Arkansas Power & Light Company.....	\$27.94	\$36.22	\$8.28
Louisiana Power & Light Company.....	28.48	28.75	.29
Mississippi Power & Light Company.....	31.92	35.82	3.90

This would seem to indicate that Louisiana and its customers will find themselves in a precarious position if Louisiana is forced to dispose of its non-electric property.

If Louisiana's cost per customer increased \$8.28 as did Arkansas, less Louisiana's increase of \$0.29 per customer, or \$7.99 per customer, the additional annual cost would be \$1,499,731.

If Louisiana's cost per customer increased \$5.80 per customer (the average of Arkansas and Mississippi less Louisiana's increase) the additional annual expense would amount to \$1,088,666.

6. This Commission must concern itself with the welfare of the electric ratepayers as well as the gas ratepayers. One of the larger elements in the cost of electric service is the cost of fuel for Louisiana's generating stations. All of these stations use natural gas for fuel. The fact that Louisiana is a potential customer for large amounts of natural gas for distribution purposes, as well as for fuel, puts it in a better position in interesting suppliers of natural gas in supplying its total requirements, and thus puts it in a better position to get a better price for its fuel requirements for the generating stations.

V

- (2) Both the electric system and the gas system of Louisiana Power & Light Company are located entirely within the State of Louisiana

The maps attached hereto as Exhibits G-1, G-2 and G-3 show the electric and gas properties of Louisiana. As seen from these maps, all of the electric and all of the gas system of Louisiana is located within the State of Louisiana. Map G-1 shows Louisiana's combined gas and electric systems. Map G-2 shows Louisiana's gas system alone by towns. Map G-3 shows communities in Louisiana receiving gas service, and the various companies serving them.

VI

- (3) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation

It is the opinion of the Commission that in the combined operations of gas and electric service, the advantages of localized management are not impaired. Exhibit H shows a chart of the organization of Louisiana. It has been the Commission's experience that in matters of regulation in which the Commission is concerned, that full authority has been vested in the officers of Louisiana, and that in the matter of local service and the handling of local complaints, sufficient authority has been vested in the Division Managers and District Managers to effect all the advantages of localized management.

The Commission's long experience in regulating Louisiana Power & Light Company has indicated that it is an efficient operation. The Commission believes that severance of the gas properties would not improve but would impair this efficient operation.

This Commission has found that regulation of Louisiana in its joint operations has been very effective. Electric and gas rate reductions were put into effect on numerous occasions.

No increase in electric rates has ever been granted to, or ever sought by, Louisiana, although the only other comparable electric utility company in the State has been required to effect a material general rate increase. No general gas rate increase has been put into effect by Louisiana, and the only gas rate increases granted to Louisiana have been in the exact amount of the increase in the cost of the gas purchased for resale by Louisiana.

Other utilities under the Commission's jurisdiction continue to operate both electric and gas systems, among these being Gulf States Utilities Company and Central Louisiana Electric Company, Inc. The Commission has not found that this combined operation in any way impaired the effectiveness of the Commission's regulation of these utilities. The mere fact that Louisiana is a subsidiary of a registered holding company would have no bearing on this situation, since, even if the gas properties were disposed of, Louisiana's electric operations would still be operated by the subsidiary of a registered holding company, and the fact that the gas operations were not, in the Commission's opinion would have no bearing.

VII

- (4) No law of the State of Louisiana prohibits the ownership or operation by a single company of utility assets of an electric utility and a gas utility, and Louisiana Power & Light Company has the express approval of this Commission to continue operation of both utility systems

Attached hereto as Exhibit J is an order of this Commission expressly declaring that the disposition by Louisiana of its gas properties is contrary to the public interest and authorizing this application by the Commission to the Securities and Exchange Commission. Attached hereto as Exhibit K is an order adopted by this Commission under date of June 16, 1953 restraining disposition by utilities under its jurisdiction of assets without this Commission's consent. This order was entered because of the Commission's concern that the ratepayers might suffer as a result of the loss of substantial economies of operation as a result of such disposition.

VIII

- (5) The public interest and the interest of electric and gas consumers of Louisiana will best be served by the continued operation of both systems by Louisiana Power & Light Company

As shown by Exhibit B, the minimum additional cost to the electric and gas consumers of Louisiana which would result from a separation of the gas properties would be \$957,193. In most cases, Louisiana serves electricity also to its gas consumers. In addition to this additional measurable cost, there are certain other increased costs which the utility consumer will have to bear, as outlined in paragraph IV above. After careful consideration of the matter, this Commission knows of no offsetting or compensating advantages that would be gained by separate operation.

That the Company has been devoting considerable attention to the building up of the gas property will be apparent from Item "A" of Exhibit I (See Chart). The figures reflect that for each of the years 1952, 1953, and 1954, the gas property percentage-wise has grown more than 70% faster than the electric property.

This same Exhibit I, Item "C", shows that, on a three years average, the electric property forms 91.5% of Louisiana Power & Light Company's total investment in Plant and that non-electric property comprises only 8.5% of Total Plant.

Items "B" and "D" of this same exhibit reflect that, while for the three-year period (1952 through 1954), 16.9% of the Company's charges for Sales Promotion Expenses were to Non-Electric Departments, the Non-Electric Departments provided only 11.27% of the Company's Net Revenues from Operation.

On the other hand, it is the Commission's belief that service to the public will be impaired to a certain extent by the separation. Therefore, it is the considered opinion of this Commission that the public interest and the interest of electric and gas consumers who are customers of Louisiana Power & Light Company will best be served by the retention by that Company of

its gas properties and their operation in combination with its electric properties.

IX

- (6) It is the desire of all official governmental agencies concerned with the service which Louisiana Power & Light Company renders, that Louisiana Power & Light Company retain both electric and gas systems

Attached as Exhibit L is a copy of a letter written by the Governor of the State of Louisiana to the Commission, expressing the opinion of the Chief Executive. Attached as Exhibits M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z are resolutions of or letters from the Police Juries of Franklin, Concordia, East Carroll, West Carroll, Jackson, Madison, Morehouse, Plaquemines, Richland, St. Bernard, St. Tammany, Tangipahoa, Livingston and St. Charles Parishes indicating that they favor the retention of the gas properties by Louisiana Power & Light Company.

Attached hereto as Exhibits AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY, ZZ, AAA, BBB, CCC, DDD, EEE, are resolutions of or letters from the Town Councils of Albany, Amite City, Bastrop, Bonita, Collinston, Covington, Delhi, Delta, Epps, Ferriday, Gilbert, Gretna, Hammond, Harahan, Hodge, Independence, Jonesboro, Kenner, Lake Providence, Mandeville, Mangham, North Hodge, Oak Grove, Ponchatoula, Rayville, Slidell, Tallulah, Westwego, Winnsboro, Wisner, and from the Police Juror of Franklin Parish from the Community of Baskin, indicating their approval of the retention of the gas properties by Louisiana Power & Light Company.

The foregoing constitute all of the Towns and all but one of the Parishes, Jefferson, in which gas service is rendered by Louisiana Power & Light Company.

This one missing Parish, Jefferson, did unanimously pass a Resolution on February 2, 1955 in opposition to the Company's disposition of the gas property (Exhibit FFF) but repealed this Resolution unanimously on March 22, 1955 (Exhibit GGG).

Also attached are Exhibits HHH and III relative to the

Parish of Jefferson's retention of attorneys and an Engineer in connection with its proposal to acquire said gas system operating in that Parish.

X

CONCLUSION

This Commission believes that the foregoing showing demonstrates that retention of the gas properties by Louisiana Power & Light Company would be in full compliance with Section 11 (B) (1) of the Public Utility Holding Company Act of 1935. This will be further demonstrated in its accompanying brief and on oral argument. It further believes that this showing demonstrates that the public interest and that of the utility consumers would be best served by such retention.

The Commission reserves the right to make a further showing, if desired, in the light of any offer of proof made by the Division of Corporate Regulations, Louisiana Power & Light Company and Middle South Utilities, Inc.

LOUISIANA PUBLIC SERVICE COMMISSION,

By C. W. COLEMAN,

Secretary.

United States of America

Before the Securities and Exchange Commission

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COM-
PANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW ORLEANS
PUBLIC SERVICE INC., RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

(Public Utility Holding Company Act of 1935)

EXHIBIT No. B—SCHEDULE No. 9

*Louisiana Power & Light Company***Miscellaneous Direct Expenses—Non-Electric**

Expenses in this category include miscellaneous expenses of field operations—the division and district offices. Typical of the type of expense s Postage, Telephone and Telegraph, Employees' Expense Accounts, Managers' Funds, etc.

Water Expenses—Actual 1954:

Direct Operation-----	\$569
Direct Maintenance-----	1,364
	<u>\$1,933</u>

Gas Expenses—Actual 1954:

Distribution:	
Operation-----	13,936
Maintenance-----	2,821
Customers' Accounting-----	20,490
Sales Promotion-----	20,385
	<u>57,632</u>
	59,565

Expenses that would accompany the non-electric property:

Water (All—as per above)-----	\$1,933
Gas*-----	6,685

Expenses to accompany Non-Electric Operations----- 8,618

Expenses to remain with Company in Electric Operations----- 50,947

*Total cost charged Gas Operations—1954-----	\$57,632
Average Number Gas Customers-----	62,116
Annual average cost per customer (cents)-----	0.93
Number of gas customers in territory where there are no electric customers-----	7,118

Expenses to accompany Non-Electric $7,118 \times \$0.98$ ----- 6,685

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY,
LOUISIANA GAS SERVICE CORPORATION

(File No. 70-3315)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY

(File No. 31-620)

(Public Utility Holding Company Act of 1935)

EXHIBIT No. A

Louisiana Power & Light Company

Non-Electric Customers, Sales and Revenues, Year 1954

	Number of customers		M. C. F. sales	Operating revenues
	End of year	Average for year		
Gas operations:				
Residential.....	59,740	57,188	4,079,912	\$2,832,157
Commercial.....	5,320	4,703	1,121,038	505,610
Industrial.....	239	208	10,968,815	1,707,486
Government and municipal.....	18	17	328,744	75,924
Total general business.....	65,317	62,116	16,496,509	5,121,177
Rent from gas property.....				141
Customers' forfeited discounts.....				43,123
Miscellaneous gas revenues.....				99,745
Total other gas revenue.....				143,009
Total gas.....	65,317	62,116	16,496,509	5,264,186
Revenue per customer:				
Residential.....			\$40.52	
Commercial.....			107.51	
M. C. F. sales per customer:				
Residential.....			71.3	
Commercial.....			238.4	
Revenue per M. C. F. in cents:				
Residential.....			69.42	
Commercial.....			45.10	
Industrial.....			15.57	
Government and municipal.....			23.24	
General business.....			31.04	
	Number of customers		M. gallons sales	Operating revenues
	End of year	Average for year		
Water operations:				
Residential.....	607	590	37,906	\$21,003
Commercial.....	121	125	12,039	5,760
Industrial.....	2	3	1,574	518
Total water.....	730	718	51,519	27,281
Total non-electric revenue.....				5,291,467

EXHIBIT No. B

Louisiana Power & Light Company

Additional Estimated Annual Cost of Utility Services to Customers Residing in Louisiana Resulting From Company's Disposition of Non-Electric (Gas and Water) Properties

Annual additional costs to non-electric customers (See Exhibit No. B-1)-----	\$272, 816
Annual additional costs to electric customers (See Exhibit No. B-2 and schedules attached thereto)-----	684, 377
Total annual additional costs to Louisiana utility customers-----	957, 193

EXHIBIT No. B-1

Louisiana Power & Light Company

Showing Estimated Annual Additional Costs to an Independent Non-Electric Operation Resulting from Disposition by the Company of Non-Electric Properties—Based on Operating Costs Per Customer

	Estimate of Cost of the Gas and Water Property being operated separately from Electric	Actual Cost Per Records 1954	Annual Additional Cost to Non-Electric
Gas Operations (Based on 62,116 Avg. Customers):			
Gas Purchased for Resale (Actual)-----	\$2, 379, 608	\$2, 379, 608	
Distribution Expenses @ 8.50/Cust.-----	528, 000	389, 537	\$138, 463
Customers Accounting @ 4.65/Cust.*-----	288, 800	185, 498	103, 302
Sales Promotion @ 2.25/Cust.*-----	139, 800	136, 631	3, 169
Administrative and General:			
Franchise Requirements (Actual)-----	31, 822	31, 822	
Other @ 6.75/Cust.*-----	419, 300	508, 253	(88, 953)
Total Admin. and General-----	451, 122	540, 075	(88, 953)
Total Gas-----	3, 787, 330	3, 631, 349	155, 981
	1954—Actual		
Water Operations:	20, 934	20, 934	
Total Operating Expenses-----	3, 808, 264	3, 652, 283	155, 981
Additional Capital Expenditures:			
General Office & Service Building and Storerooms-----		250, 000	
Transportation Equipment-----		201, 000	
Shop Equipment and Tools-----		65, 500	
Communication Equipment-----		32, 400	
Office Furniture and Equipment-----		195, 000	
Miscellaneous-----		35, 000	
Total-----		778, 900	
\$778,900×15% (Estimated Fixed Charges Necessary to earn a 6% Return)-----			116, 835
Total Added Annual Costs to Non-Electric Operations Brought About by Separation of Property-----			272, 816

() Denotes Credit.

*As no separate study was made of water expenses, the amount used is the same as Actual Cost for 1954.

*See Ebasco Study of August, 1954 for 1955, Exhibit B-5, File No. 70-3315.

EXHIBIT No. B—SCHEDULE No. 10

Louisiana Power & Light Company

Special Services

**Amount of Special Services charged to the non-electric operation in
1954----- \$28, 133**

NOTE.—This amount represents fees for independent auditing service in addition to fees for general services such as, Indenture Requirements, Fiduciary Fees, Insurance, Safety Services, Tax Service, and Services of General Consultants. These charges are of a general nature and represent largely an allocation on a customer basis. It is not felt that the disposition of non-electric property would result in reduced Special Services. This amount would, therefore, be added to the cost of operating the electric property.

EXHIBIT No. B—SCHEDULE No. 11

Louisiana Power & Light Company

Legal Services

**Amount of Legal Services charged to Non-Electric Operations in
1954----- \$13, 071**

NOTE.—This represents largely an allocation on a customer basis of the amount of legal retainer paid. It is not thought that the disposition of non-electric property would result in reduced legal fees. This full amount would, therefore, be added to the cost of operating the electric property.

EXHIBIT No. B—SCHEDULE No. 12

Louisiana Power & Light Company

Regulatory Commission Expense

Regulatory Commission Expense----- \$3, 547

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT No. B-2

*Louisiana Power & Light Company*Summary of Normal Non-Electric Operating Expenses and Taxes for the
Year 1954Showing Estimated Annual Additional Costs to Electric Operations
Resulting From Disposition of Non-Electric Properties

	Sched- ule No.	Actual 1954 charges to gas and water de- partments in present com- bined opera- (books)	Amount of costs (Col. 1) that would be transferred to separate com- pany for non-electric property	Balance (1-2) added costs to electric operations
Gas Purchased for Resale.....	1	\$2,379,608	\$2,379,608	-----
Power Purchased (Water Pumping).....	2	3,903	3,903	-----
Pay Roll.....	3	815,082	423,300	\$391,782
Materials and Supplies.....	4	34,388	34,388	-----
M. and S. Overhead.....	5	1,503	-----	1,503
Automotive.....	6	58,496	58,496	-----
Uncollectible Accounts.....	7	3,323	3,323	-----
Rents.....	8	38,203	4,020	34,183
Miscellaneous Direct Expenses.....	9	59,565	8,618	50,947
Total Direct Expenses.....		3,394,071	2,915,656	478,415
Special Services.....	10	26,433	-----	26,133
Legal Services.....	11	13,071	-----	13,071
Regulatory Commission.....	12	3,547	3,547	-----
Insurance.....	13	2,357	450	1,907
Injuries and Damages.....	14	21,933	14,943	6,990
Employees' Welfare.....	15	36,844	16,345	20,499
Pensions.....	16	27,714	13,969	13,745
Franchise Requirements.....	17	33,008	33,008	-----
Miscellaneous General Expenses.....	18	93,605	2,884	90,721
Total General Expenses.....		258,212	85,146	173,066
Total Operating Expenses.....		3,652,283	3,000,802	651,481
Social Security Taxes.....	19	16,176	8,424	7,752
Corporation Franchise.....	20	13,828	-----	13,828
Franchise (Local).....	21	50	50	-----
Occupational License.....	22	16,980	16,980	-----
Real Estate and Personal Property.....	23	167,055	156,239	10,816
Regulatory Commission.....		500	-----	500
Total Taxes.....		214,589	181,693	32,896
Total Operating Expenses and Taxes.....		3,866,872	3,182,495	684,377

EXHIBIT No. B-3

Louisiana Power & Light Company

Statement Reflecting the Elimination of Certain Non-Recurring Expenses

	Operating Expenses As Per Books			Less Non-Recurring Expenses	Balance Normal Oper. Exp.
	Gas	Water	Total		
Gas Purchased.....	\$2, 379, 608		\$2, 379, 608		\$2, 379, 608
Power Purchased.....		\$3, 903	3, 903		3, 903
Pay Roll.....	803, 304	11, 778	815, 082		815, 082
Materials and Supplies.....	33, 641	747	34, 388		34, 388
M. and S. Overhead.....	1, 469	34	1, 503		1, 503
Automotive.....	57, 934	562	58, 496		58, 496
Uncollectible Accts.....	3, 323		3, 323		3, 323
Rents.....	38, 203		38, 203		38, 203
Misc'l. Direct Expenses.....	57, 632	1, 933	59, 565		59, 565
Total Direct Expense.....	3, 375, 114	18, 957	3, 394, 071		3, 394, 071
Special Services.....	26, 133		26, 133		26, 133
Legal Services.....	13, 071		13, 071		13, 071
Regulatory Commission.....	3, 547		3, 547		3, 547
Insurance.....	2, 174	183	2, 357	(See	2, 357
Injuries & Damages.....	21, 756	177	21, 933	Below)	21, 933
Employees' Welfare.....	8, 741		8, 741	\$(28, 103)	36, 844
Pensions.....	111, 937	402	112, 339	84, 625	27, 714
Franchise Requirements.....	31, 822	1, 186	33, 008		33, 008
Misc'l. General Expense.....	93, 576	29	93, 605		93, 605
Total General Expense.....	312, 757	1, 977	314, 734	56, 522	258, 212
Total Operating Expense.....	3, 687, 871	20, 934	3, 708, 805	56, 522	3, 652, 283
Analysis of Non-Recurring Expenses:					
\$ (50,000) Credited to Employees' Welfare Expenses and concurrently charged pensions and represents charges of \$7, 500-1952, \$42, 500-1953 amount applicable to Gas-25%.....					\$ (12, 500)
\$(83, 989) Credited to Employees' Welfare Expenses resulting from Employees Group Life Insurance dividend for year 1953 amount applicable to Gas after allocating \$21, 577 to construction-25%.....					(15, 603)
Total Employees' Welfare Expense.....					\$ (28, 103)
\$338, 500 Charged to Pensions for Past Service Benefits of which 25% was applicable to Gas.....					\$84, 625
(This amount includes \$50, 000 transferred from Employees' Welfare Expenses.)					

(.) Denotes red figure.

EXHIBIT No. B—SCHEDULE No. 1

Louisiana Power & Light Company

Gas Purchased—1954

GAS PURCHASED

Source	Location	M. C. F.	Amount
United Gas.....	N. O. Area.....	12,872,691	\$1,698,072
United Gas.....	Southeast La.....	1,318,263	271,173
United Gas.....	North La.....	2,071,572	377,712
Sub-total.....		16,262,526	2,346,957
Olin Gas.....	North La.....	185,317	27,797
Texas Gas.....	North La.....	18,161	4,696
Total.....		16,466,004	2,379,450
Gas Purchased expense.....			158
Total.....			2,379,608

NOTE.—If Company disposes of non-electric property the total amount here reflected will, of course, accompany the non-electric operations.

EXHIBIT No. B—SCHEDULE No. 2

Louisiana Power & Light Company

Power Purchased—Interdepartmental—1954

Power Purchased—Interdepartmental (Water):

Water Pumping..... 390,323 KWH..... \$3,903

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT No. B—SCHEDULE No. 15
Louisiana Power & Light Company
Employees' Welfare Expenses

<i>Employees' welfare expenses</i>	<i>Total cost to company 1954</i>
Employees' Group Life Insurance.....	\$73,857
Employees' Group Health and Accident.....	4,703
Total	78,560
Total Pay Roll—Entire Company—1954	6,482,647
Percent of Pay Roll	1.21
Amount applicable to this study on basis of \$423,300 Pay Roll (as revised) @ 1.21%	\$5,121
Hospitalization.....	\$38,193
Miscellaneous Welfare Expenses (including Christmas Parties, Safety Suppers, Publication of House Organ, etc.).....	35,263
Total	73,456
Total average number of employees	1,597
Expense per employee	46.00
Amount applicable to this study on basis of 244 employees @ \$46.00	11,224
Total Employees' Welfare Expenses	16,345

Analysis of employees' welfare expenses	Total expenses per record	Excluded expenses	Applicable expenses
Pay Roll.....	#\$28,556	#\$28,556	
Employees' Group Life.....	(10,132)	(83,989)	\$73,857
Employees' Group Health and Accident.....	4,703		4,703
Sub-Total	23,127	(55,433)	78,560
Hospitalization.....	38,193		38,193
Supplemental Retirement benefits for 1952 and 1953 Transferred to Pensions.....	(50,000)	(50,000)	
Miscellaneous (Safety Suppers, Christmas Parties, Publication of House Organ, etc.).....	35,263		35,263
Sub-Total	23,456	(50,000)	73,456
Total	46,583	(105,433)	152,016

(#) Denote red figures.

EXHIBIT No. B—SCHEDULE No. 3

Louisiana Power & Light Company

Employee and Pay Roll Reduction Due to Disposition of Non-Electric Property

Name and location	Number of employees	Month of December 1954			
		Total earnings	Distribution of earnings		
			Operations	Construction	Other
Summary					
Northern—Oper.....	35	\$10,132	\$7,892	\$2,126	\$114
Southeastern—Oper.....	38	11,879	10,061	1,807	11
West Bank—Oper.....	18	5,647	4,289	1,332	26
Subtotal.....	91	27,658	22,242	5,265	151
Northern—Const.....	46	11,789	2,392	9,388	9
Southeastern—Const.....	55	12,417	3,664	8,358	395
West Bank—Const.....	34	8,074	1,935	5,953	186
Subtotal.....	135	32,280	7,991	23,699	590
Northern—Total.....	81	21,921	10,284	11,514	123
Southeastern—Total.....	93	24,296	13,725	10,165	406
West Bank—Total.....	52	13,721	6,224	7,285	212
Subtotal.....	226	59,938	30,233	28,964	741
Nondivisional.....	18	5,368	5,040	384	(56)
Total—December 1954.....	244	65,306	35,273	29,348	685
Percent.....		100.0	54.0	44.9	1.1
Year 1954—Based on using 12 months like December as above ¹	244	\$783,700	\$423,300	\$352,200	\$8,200

NOTE.—See Schedules 3-A through 3-C attached.

A thorough review of the Company's payroll was made with Managers and Supervisors to determine the minimum number of employees that must be retained to competently operate the electric department. The study indicated that the above 244 employees would be available to operate the non-electric properties and thus would be "separated" from the Company payroll.

The separately operated electric property would of necessity retain practically all General Office employees (from the President down) even though a percent of such employees time had previously been charged, on a customers basis, to gas and water operation. This same situation would be true as to Division personnel, Customers Billing Operations, Meter Readers, Cashiers, etc.

¹ Proof as to accuracy of using 12 times the amount of December for the year 1954.

	Col. 1 Actual for Mo. of Dec. 1954	Col. 2 Year based on 12 De- cember (Col. 1×12)	Col. 3 Actual for 12 Mos. of 1954	Col. 4 Percent Col. 2 is to Col. 3
Total Payroll.....	\$539,818	\$6,477,816	\$6,482,647	99.9
Payroll charged to Non-Electric Oper. Expenses.....	68,068	816,816	815,082	100.2
Payroll charged Total Oper. Expenses.....	375,569	4,506,828	4,521,195	99.7
Payroll charged to Construction.....	143,073	1,716,876	1,721,305	99.7

() Denotes credit.

EXHIBIT NO. B—SCHEDULE NO. 3-A

Louisiana Power & Light Company

Employee and Pay Roll Reduction Due to Disposition of Non-Electric Property

Location and Job Title	Month of December 1954			
	Total earnings	Distribution of earnings		
		Operations	Construction	Other
Northern Division				
Division Engineering:				
Engineer.....	\$539.00	\$529.37		\$9.63
Associate engineer.....	425.00	65.12	\$271.33	88.55
Draftsman A.....	327.60	181.01	156.33	(9.74)
Typist.....	215.04	211.20		3.84
Construction crew (46 employees)	11,788.98	2,392.45	9,387.46	9.07
Division gas supt., 2 gas foremen, 5 welders, 4 mechanics, 1 clerk, 2 truck drivers, 4 helpers, 27 laborers.				
Arcadia:				
Laborer.....	169.68	137.36	32.32	
Serviceman B.....	323.19	307.98	15.21	
Laborer.....	204.96	175.68	29.28	
Clerk C.....	195.52	195.52		
Bastrop:				
Serviceman A.....	485.52	324.94	143.02	17.56
Clerk A.....	315.84	315.84		
Serviceman B.....	366.23	187.37	178.86	
Helper.....	243.46	155.84	87.62	
Helper.....	252.40	252.40		
Clerk C.....	191.52	191.52		
Sales representative.....	408.00		408.00	
Ferriday:				
Serviceman A.....	420.07	415.27	4.80	
Serviceman B.....	463.22	310.33	152.89	
Clerk C.....	124.16	124.16		
Jonesboro:				
Serviceman A.....	439.11	382.69	56.42	
Serviceman B.....	339.30	339.30		
Clerk C.....	162.96	162.96		
Oak Grove:				
Serviceman B.....	377.36	264.69	112.67	
Clerk C.....	166.96	166.96		
Helper.....	244.53	176.93	66.16	1.44
Serviceman B.....	301.46	250.48	47.46	3.52
Clerk C (temporary).....	104.40	104.40		
Rayville:				
Laborer.....	211.06	181.61	29.45	
Clerk C.....	146.16	146.16		
Helper.....	289.85	264.37	25.48	
Tallulah:				
Serviceman A.....	399.84	278.46	121.38	
Helper.....	240.24	220.22	20.02	
Laborer.....	210.45	97.24	113.21	
Winnsboro:				
Meter reader.....	238.56	214.42	24.14	
Laborer.....	204.96	204.96		
Serviceman B.....	384.78	354.34	30.44	
Total Northern, 81.....	21,921.37	10,283.55	11,513.95	123.87

() Denote red figures.

EXHIBIT NO. B—SCHEDULE NO. 3-B

*Louisiana Power & Light Company*Employee and Pay Roll Reduction Due to Disposition of Non-Electric
Property

Location and job title	Month of December 1954			
	Total earnings	Distribution of earnings		
		Operations	Construction	Other
Southeastern Division				
Southeastern Gas (55 employees)..... 1 Engineer, 1 Asst. Engineer, 4 Foremen, 1 Mechanic, 4 Welders, 1 Draftsman, 1 Typist, 4 Truck Drivers, 4 Helpers, and 34 Laborers.	\$12,416.50	\$3,663.93	\$8,357.80	\$394.77
Amite:				
Serviceman A.....	467.67	413.37	51.83	2.47
Serviceman B.....	452.62	384.00	59.77	8.85
Serviceman B.....	365.46	350.23	15.23	
Covington:				
District Manager.....	486.00	486.00		
Serviceman A.....	423.05	336.27	86.78	
Serviceman A.....	399.84	389.13	10.71	
Serviceman C.....	267.72	267.41	20.31	
Serviceman B.....	356.16	330.72	25.44	
District Clerk.....	283.92	283.92		
Clerk C.....	147.20	147.20		
Janitor.....	23.40	23.40		
Janitor.....	16.17	16.17		
Helper.....	184.11	138.37	45.74	
Hammond:				
Serviceman A.....	487.90	414.84	73.06	
Serviceman C.....	283.92	236.60	47.32	
Helper.....	219.48	219.48		
Clerk C.....	162.96	162.96		
Ponchatoula:				
Serviceman B.....	337.64	193.33	144.31	
Clerk C.....	146.16	146.16		
Riverlake:				
Technician.....	399.84	399.84		
Serviceman A.....	592.63	589.99	2.64	
Serviceman A.....	409.36	409.36		
Serviceman A.....	425.37	214.40	210.97	
Serviceman A.....	399.84	399.84		
Serviceman C.....	287.30	174.50	112.80	
Serviceman B.....	443.04	403.07	39.97	
Serviceman B.....	426.12	426.12		
Clerk C.....	230.16	230.16		
Clerk B.....	309.06	309.06		
Clerk C.....	191.52	191.52		
Meter Reader.....	241.12	241.12		
Serviceman A.....	399.84	99.02	330.82	
Serviceman B.....	364.64	290.01	74.63	
Clerk C.....	162.96	162.96		
Gas Solicitor.....	372.96	37.74	335.22	
Helper.....	216.58	96.80	119.78	
Clerk C.....	283.92	283.92		
Helper.....	191.52	191.52		
Total Southeastern, 93.....	24,295.66	13,724.44	10,165.13	406.09

EXHIBIT No. B—SCHEDULE No. 16

Louisiana Power & Light Company

Pensions		Total Cost to Company 1954
Pensions	-----	\$552, 292
Less non-recurring past service benefits	-----	338, 500
		<hr/>
Balance—Normal	-----	213, 792
		<hr/>
Total Pay Roll	-----	6, 482, 647
% of Pay Roll	-----	3. 30
Amount applicable to this study on basis of \$423,300 Pay roll		
@ 3.30%	-----	13, 960

EXHIBIT No. B.—SCHEDULE No. 17

Louisiana Power & Light Company

Franchise Requirements

Franchise Requirements:	
Gas Department	----- \$31, 822
Water Department	----- 1, 186
	<hr/>
	33, 008

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT No. B—SCHEDULE No. 18

Louisiana Power & Light Company

Miscellaneous General Expenses

Miscellaneous General Expenses:	
American Gas Association—1954 Dues	----- \$1, 977
Southern Gas Association—1954 Dues	----- 907
	<hr/>
Total	----- 2, 884

This account covers a various assortment of miscellaneous expenses incurred in or for the General Office of the Company, such as Expense Accounts, Telephone and Telegraph charges, Postage, Trade Associations, Director Fees and Expenses, Trustees Fees, Annual Employee Meetings, etc.

Other than the amounts shown above, it is thought that the 1954 costs would remain with the electric operation.

EXHIBIT NO. B—SCHEDULE No. 3-C

Louisiana Power & Light Company

Employee and Pay Roll Reduction Due to Disposition of Non-Electric Property

Location and job title	Month of December 1954 ^o			
	Total earnings	Distribution of earnings		
		Operations	Construction	Other
West Bank Division				
West Bank Gas (34 Employees)	\$8,074.16	\$1,935.35	\$5,952.78	\$186.03
1 Engineer, 1 Asst. Engineer, 2 Foremen, 1 Mechanic, 3 Welders, 2 Clerks, 2 Truck Drivers, 3 Helpers, and 19 Laborers.				
Arabi:				
Servicemen C.....	283.92	43.94	239.98	
Clerk C.....	171.36	171.36		
Helper.....	290.04	290.04		
Gretna Service:				
Serviceman A.....	399.84	399.84		
Serviceman A.....	581.91	252.77	329.14	
Serviceman A.....	459.94	433.52		26.42
Serviceman B.....	409.69	256.74	152.95	
Serviceman C.....	455.03	217.54	237.49	
Gas Solicitor.....	372.96		372.96	
Meter Reader.....	288.99	288.99		
Meter Reader.....	344.76	344.76		
Helper.....	240.24	240.24		
Gretna District:				
Clerk C.....	230.16	230.16		
Clerk C.....	230.16	230.16		
Clerk C.....	230.16	230.16		
Janitor.....	204.53	204.53		
Clerk C.....	223.44	223.44		
Clerk C.....	230.16	230.16		
Total West Bank, 52.....	13,721.45	6,223.70	7,285.30	212.45
General Office				
Central Billing:				
Clerk C.....	159.20	159.20		
Billing Operator.....	295.56	295.56		
Typist.....	240.24	240.24		
Billing Operator.....	308.92	308.92		
Billing Operator.....	333.43	333.43		
G. O. Construction (12 Employees)	3,849.04	3,521.48	383.64	(56.08)
1 Gas Superintendent, 2 Clerks B, 2 Gas Foremen, 2 Mechanics A, 2 Mechanics B, 3 Laborers.				
State Meter:				
Clerk C.....	181.44	181.44		
Total Non-Divisional, 18.....	5,367.83	5,040.27	383.64	(56.08)

() Denotes red figures.

EXHIBIT NO. B—SCHEDULE NO. 4

Louisiana Power & Light Company

Materials and Supplies—1954

Materials and Supplies:

Gas Operations:

Distribution:

Operation	\$7,393
-----------	---------

Maintenance	14,645
-------------	--------

Customers Accounting	4,152
----------------------	-------

Sales Promotion	353
-----------------	-----

Admin. & Gen'l.:

Operation	4,457
-----------	-------

Maintenance	2,641
-------------	-------

Total Gas	33,641
-----------	--------

Water Operations:

Operation	119
-----------	-----

Maintenance	628
-------------	-----

Total Water	747
-------------	-----

Total Materials and Supplies	34,388
------------------------------	--------

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT NO. B—SCHEDULE NO. 5

Louisiana Power & Light Company

Materials and Supplies—Overhead—1954

Charged to Non-Electric Operation	\$1,503.00
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It is not considered likely that the present company would be able to reduce its purchasing and other similar costs even though gas and water properties were disposed of. This cost would thus be for account of the electric operations.

EXHIBIT NO. B— SCHEDULE NO. 6

Louisiana Power & Light Company

Transportation Expense—1954

Transportation Expenses (Automotive):

Gas Operations:

Distribution:

Operation	\$28, 611
Maintenance	3, 347
Customers Accounting	8, 641
Sales Promotion	7, 941
Admin. & Genl.:	
Operation	10, 825
Maintenance	569
Total Gas	<u>57, 934</u>

Water Operations:

Operation	328
Maintenance	128
Admin. & Genl.—Operation	110
Total Water	<u>562</u>

Total Transportation

	<u>\$58, 496</u>
--	------------------

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT NO. B—SCHEDULE NO. 7

Louisiana Power & Light Company

Accounts Written Off As Uncollectible

Uncollectible Accounts:

Gas Operation	\$3, 323
Water Operation	
Total Uncollectible Accounts	<u>3, 323</u>

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT No. B—SCHEDULE No. 8

Louisiana Power & Light Company

The locations below represent rented property where Company has gas service only. If Non-Electric was disposed of these offices would accompany such but the present Company would continue to retain all other offices for electric operations

Rents:

Jonesboro -----	\$600
Lake Providence -----	900
Rayville -----	600
Covington -----	600
Slidell -----	600
Right of Way-Ninemile Point Jefferson Parish -----	600

Total Rents -----	4,020
-------------------	-------

Total Rent charged Non-Electric during 1054 -----	\$38,203
---	----------

Amount of such to accompany Non-Electric Property -----	4,020
---	-------

Amount of Rent to adhere to Electric Property -----	34,183
---	--------

EXHIBIT No. E

Louisiana Power & Light Company

Statement Reflecting Seasonal Variation in Electric and Gas Sales and how Combined Ownership Tends for a More Balanced Operation

1954	Winter 6 Mos.	Summer 6 Mos.	Total
	Nov.-Dec. Jan.-Apr.	May-Octo- ber	
Electric:			
Residential Revenue.....	\$4,000,973	\$5,116,394	\$9,117,367
Commercial Revenue.....	2,328,576	2,969,939	5,298,515
Total.....	6,329,549	8,086,333	14,415,882
Percent.....	43.9	56.1	100.0
Gas:			
Residential Revenue.....	2,057,077	775,080	2,832,157
Commercial Revenue.....	352,686	152,924	505,610
Total.....	2,409,763	928,004	3,337,767
Percent.....	72.2	27.8	100.0
Combined:			
Revenue.....	8,739,312	9,014,337	17,753,649
Percent.....	49.2	50.8	100.0

EXHIBIT No. B—SCHEDULE No. 13 (1 of 2)

Louisiana Power & Light Company

Fire Insurance—1954

Property and Location	1954 Premium Allocated to Non-Electric	To be trans- ferred to New Non-Electric Company
Algiers:		
G. O. and C. B. O., 142 Delaronde St.	\$206.51	
Misc'l Bldgs. and Auto Sheds	15.28	
Amite:		
Office, Display Room and Storeroom	52.43	
Arabi:		
Office, Display Room and Storeroom	183.89	
Bastrop:		
Office, Display Room and Storeroom	76.74	
Covington:		
Office, Display Room and Storeroom	41.92	\$41.92
Delhi:		
Office, Display Room and Storeroom	28.62	
Meter Repair Shop at Storeroom—B	53.08	
Meter Repair Shop at Storeroom—C	76.50	76.50
Meter and Regulator Storeroom at Sub.—B	15.00	
Meter and Regulator Storeroom at Sub.—C		
Bridgedale:		
Gas Meter Shop and Storeroom—B	187.49	187.49
Gas Meter Shop and Storeroom—C		
Ferriday:		
Office and Display Room	4.60	
Gretna:		
Division and District Office	60.29	
Hammond:		
Office and Display Room	31.92	
Jonesboro:		
Office and Display Room	54.99	
Kenner:		
Office, Display Room and Storeroom	77.60	

EXHIBIT No. B—SCHEDULE No. 13 (2 of 2)

Louisiana Power & Light Company

Fire Insurance

	1954 Premium Allocated to Non-Electric	To be trans- ferred to New Non-Electric Company
Lake Providence:		
Office and Display Room	\$53.68	\$53.68
Metairie:		
Office and Display Room	124.30	
Oak Grove:		
Office and Display Room	35.76	
Rayville:		
Office and Display Room	45.79	45.79
Tallulah:		
Office and Display Room	28.39	
West Monroe:		
Division and District Offices	86.06	
Sales Office	13.52	
Winnaboro:		
Office, Display Room and Storeroom	45.26	
Subtotal	1,599.62	405.38
Miscellaneous Fire Schedule	32.56	18.82
Total Gas	1,632.18	424.20
Water—Arcadia	153.22	25.63
		490.83

EXHIBIT No. B—SCHEDULE No. 14

Louisiana Power & Light Company

Injuries and Damages

	<i>Total Cost To Company 1954</i>
Insurance—Injuries and Damages:	
Workmen's Compensation-----	\$78,329
Public Liability-----	20,931
	<hr/>
Total-----	99,260
Total Pay Roll-----	6,482,647
% of Pay Roll-----	1.53%
	<hr/>
Amount applicable to this study on basis of \$423,300 Pay Roll (as shown on Exhibit B, Sc. No. 3) @ 1.53%-----	\$6,477
Excess Public Liability & Property Damage:	
16¢ per \$100 of Operating Revenue Less Intercompany-----	
Amount applicable to this study on basis of \$5,291,467 Operat- ing Revenues @ 16¢ per \$100-----	8,468
	<hr/>
Total insurance—Injuries and Damages-----	14,943

34 S. E. C. VS. LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

EXHIBIT No. B—SCHEDULE No. 19

Louisiana Power & Light Company

Social Security Taxes—1954

	Total Cost To Company 1954
Social Security Taxes:	
Federal Old Age-----	\$101,372
Federal Unemployment-----	13,576
State Unemployment-----	13,847
Total-----	128,795
Total Pay Roll-----	6,482,647
Percent of Pay Roll-----	1.99%
Amount applicable to this study on basis of \$423,300 Pay Roll at 1.99%-----	\$8,424

EXHIBIT No. B—SCHEDULE No. 20

Louisiana Power & Light Company

Corporation Franchise Tax

This tax is based on the Company's outstanding securities plus items considered as borrowed capital. As the Company did not propose any change in their capital structure the full amount of the tax would remain with the electric operations.

EXHIBIT No. B—SCHEDULE No. 21

Louisiana Power & Light Company

Franchise Tax

Franchise Tax (Local):	
Parish of Jefferson-----	\$25
Parish of St. Bernard-----	25
Total-----	50

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT No. B—SCHEDULE No. 22

Louisiana Power & Light Company

Occupational Licenses—1954—Gas & Water

	Gas	Water
State of Louisiana.....	\$11,960	\$75
City and Parish—Nor. Div.....	1,940	75
City and Parish—S. E. & W. B.....	2,900	
Albany.....	15	
North Hodge.....	15	
Total.....	16,830	150
		16,980

NOTE.—If Company disposes of non-electric property, this full amount would accompany the non-electric operation. No portion would be left to be absorbed by electric operations.

EXHIBIT No. B—SCHEDULE No. 23

Louisiana Power & Light Company

Real Estate & Personal Property Taxes that would accompany the Non-Electric property

Parish	
Gas:	
Concordia.....	\$1,989.94
East Carroll.....	2,847.52
Franklin.....	5,494.77
Jackson.....	3,893.00
Jefferson.....	87,735.50
Livingston.....	612.42
Madison Parish.....	2,464.83
Morehouse.....	9,638.21
Orleans.....	
Ouachita.....	
Plaquemines.....	499.07
Richland.....	5,517.30
St. Bernard.....	7,495.47
St. Tammany.....	7,138.45
Tangipahoa.....	15,471.04
West Carroll.....	1,454.32
Total Gas.....	152,251.84
Water:	
Blenville.....	3,987.38
	156,239.22

EXHIBIT No. C

Louisiana Power & Light Company

Comparison of Operating Costs per Average Gas Customer of the New Non-Electric Company with other like Companies in the South

Operating Cost per average Gas Customer of New Non-Electric Operation—See Exhibit B-1-----	\$22.15
Operating Cost per average Gas Customer of Mississippi Valley Gas Company (Gas properties formerly owned by Mississippi Power & Light Company) for year 1954 ¹ -----	22.26
Operating Cost per average Gas Customer for 1954 of the two companies in the Southern Gas Association, who are just under this New Non-Electric Company in size, and the two companies just over the New Company in size ² -----	23.14, 23.80, 20.11, 22.35

NOTE.—Expenses here reflected include Distribution, (Operation and Maintenance), Customer Accounting and Collecting, Sales Promotion and Administrative and General.

¹ Data from Mississippi Valley Gas Company

² Data from Southern Gas Association. None of these four companies have electric property

EXHIBIT No. D

Louisiana Power & Light Company

Approximate Increased Cost of Debt Financing of Non-Electric Company Over Company Serving Combination Customers

Interest cost of Bond Money to Louisiana Gas Service Corporation-----	3.55 %
Latest Interest Cost of Bond Money to Louisiana Power & Light Company-----	3.111%
Difference in Interest Cost-----	.439%
Additional Annual Interest Cost of First Contemplated Non-Electric Company borrowing over cost to Company having combination properties:	
\$4,000,000 × .439%-----	\$17,560.00
Additional Interest Cost per annum to Non-Electric Company when \$6,500,000 are outstanding-----	\$28,535.00

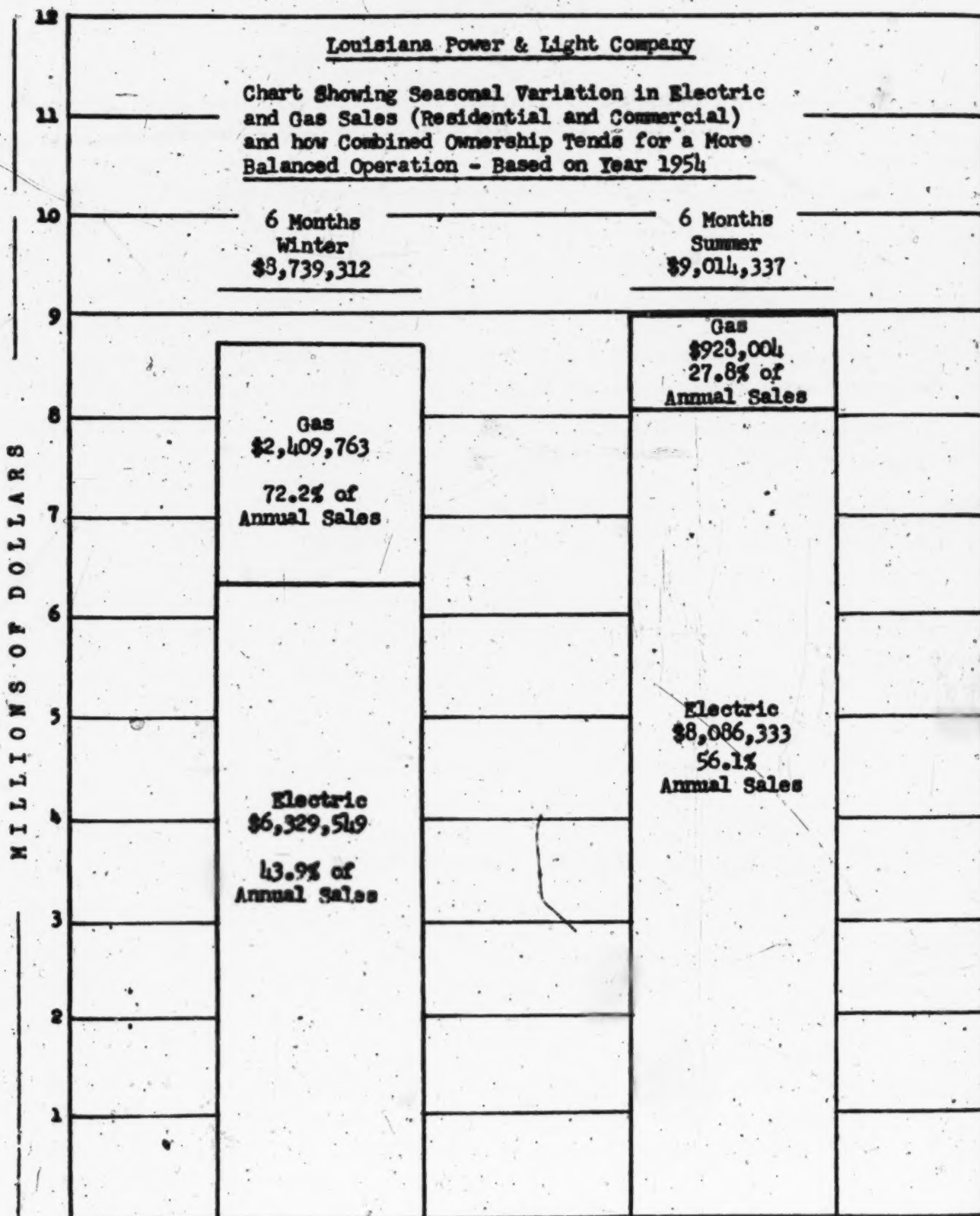


EXHIBIT No. F

Louisiana Power & Light Company

Comparison of Certain Electric Operating Expenses Per Customer of Louisiana Power & Light Company with Arkansas Power & Light Company and Mississippi Power & Light Company before and after the Latter Concerns Disposed of Their Non-Electric Properties

(000's omitted)

LOUISIANA POWER & LIGHT COMPANY

	1949 ¹		1954	
Total Operating Expenses.....		\$8,764		\$9,625
Less:				
Generation Expenses.....	\$1,931		\$2,914	
Purchased Power.....	2,994		875	
Transmission Expenses.....	262	5,187	440	4,229
Average No. Electric Customers.....	125,682	3,577	187,701	5,396
Average Cost per Customer.....		28.46		28.75

MISSISSIPPI POWER & LIGHT COMPANY ²

Total Operating Expenses.....		\$6,987		\$12,427
Less:				
Generation Expenses.....	\$586		\$4,518	
Purchased Power.....	2,421		1,964	
Transmission Expenses.....	227	3,234	299	6,781
Average No. Electric Customers.....	117,557	3,753	157,602	5,646
Average Cost per Customer.....		31.92		35.82

ARKANSAS POWER & LIGHT COMPANY ³

Total Operating Expenses.....		\$13,116		\$20,237
Less:				
Generation Expenses.....	\$2,191		\$6,710	
Purchased Power.....	4,487		3,281	
Transmission Expenses.....	408	7,086	620	10,611
Average No. Electric Customers.....	215,823	6,030	265,765	9,626
Average Cost per Customer.....		27.94		36.22

¹ The last year that all three companies operated gas properties.² Disposed of gas properties as of January 1, 1952.³ Disposed of gas properties as of January 1, 1950.

Louisiana Power & Light Company

Chart showing Comparison of Certain Operating Expenses Per Customer of Louisiana Power & Light Company with Arkansas Power & Light Company and Mississippi Power & Light Company before and after the latter concerns disposed of their Non-Electric Properties

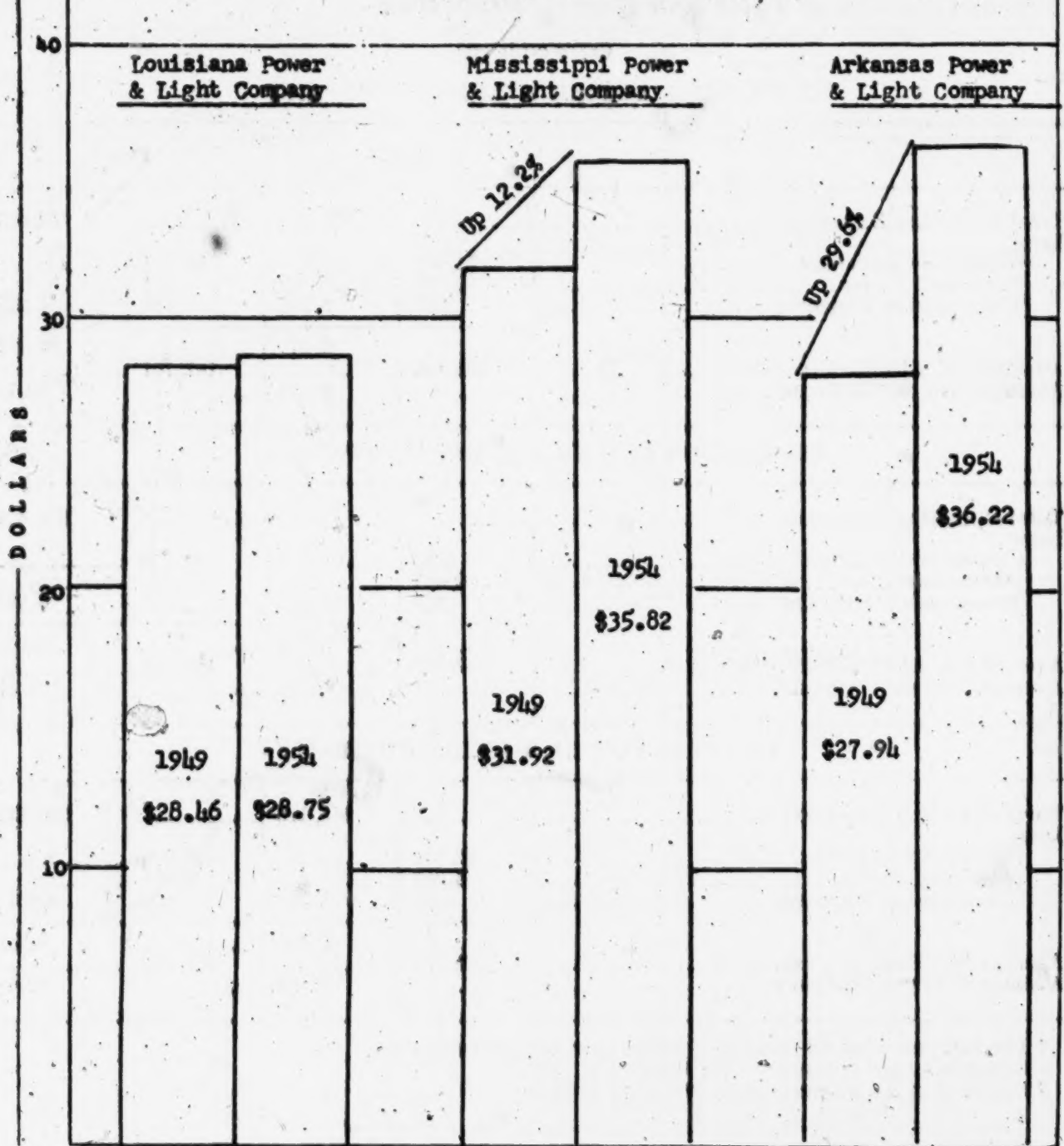


EXHIBIT No. I

Louisiana Power & Light Company

Miscellaneous Statistics

Item	1952	1953	1954
A. No. of Customers—End of Year			
Electric Customers.....	168,023	183,447	192,431
Increase over prior year (1).....	8,777	8,503	8,708
% Increase.....	5.5	5.1	4.7
Non-Electric Customers.....	56,150	61,086	66,047
Increase over prior year.....	4,915	4,936	4,961
% Increase.....	9.6	8.8	8.1
B. Sales Promotion Expense			
Charged to Electric.....	\$540,368	\$605,725	\$665,041
Charged to Non-Electric.....	99,714	134,747	136,632
Total.....	640,082	740,472	801,673
% Charged Electric.....	84.4	81.8	83.0
% Charged Non-Electric.....	15.6	18.2	17.0
C. Plant Account			
Electric.....	\$90,807,750	\$103,249,500	\$118,908,717
Non-Electric.....	8,695,422	9,611,645	10,735,426
Total.....	99,503,172	112,861,145	129,644,143
% Electric.....	91.3	91.5	91.7
% Non-Electric.....	8.7	8.5	8.3
D. Net Revenues from Operation (2)			
Electric.....	\$3,853,818	\$4,499,440	\$5,144,141
Non-Electric.....	558,764	485,684	664,110
Total.....	4,412,582	4,985,124	5,808,251
% Electric.....	87.3	90.3	88.6
% Non-Electric.....	12.7	9.7	11.4

¹ After eliminating customers secured with purchased property.

² Includes retroactive adjustments for Federal Income Taxes.

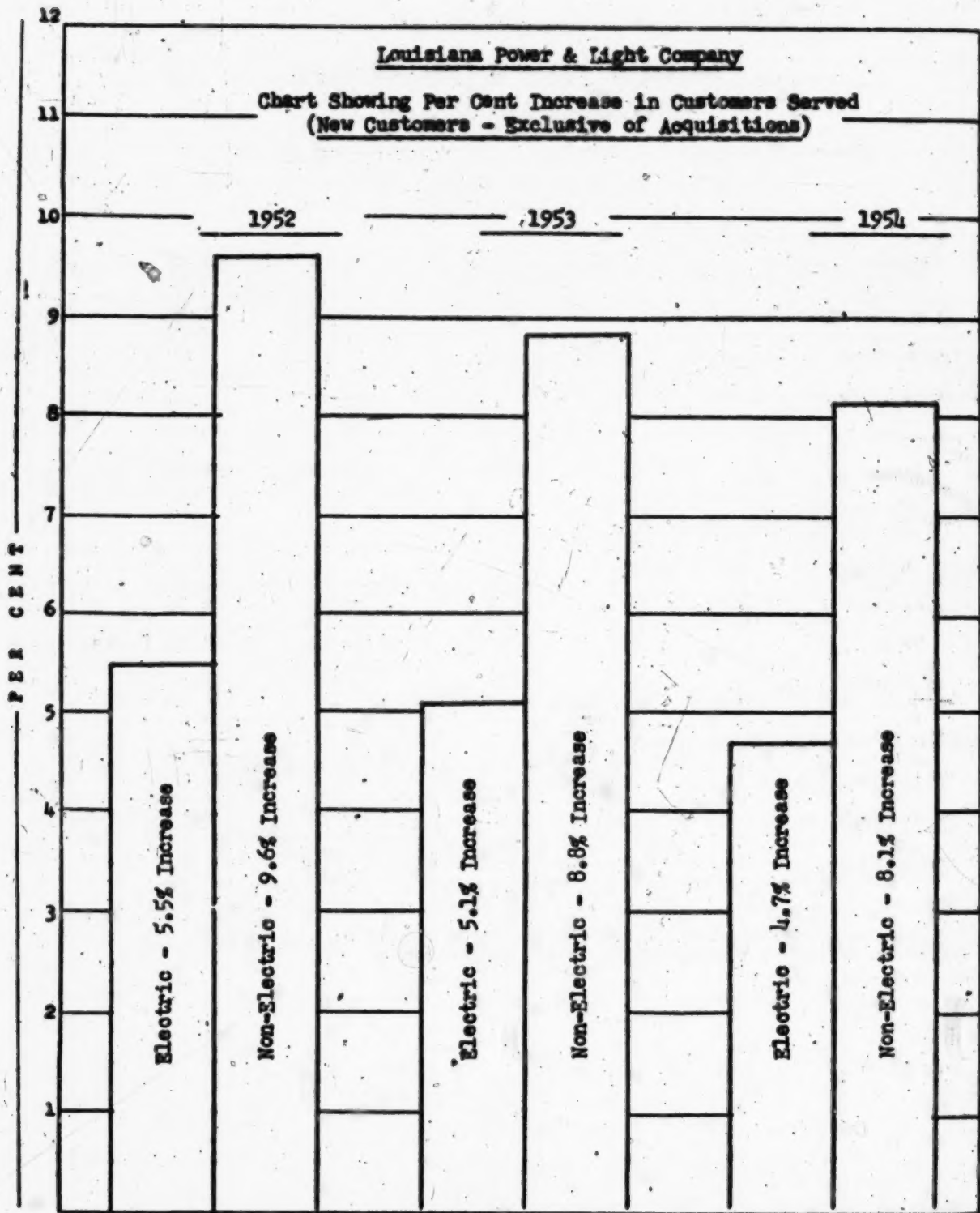


Exhibit J

LOUISIANA PUBLIC SERVICE COMMISSION

Resolution introduced by Commissioner Nat B. Knight, Jr., and unanimously passed, in session held at Baton Rouge, Louisiana, November 30, 1954:

Whereas, the Securities and Exchange Commission in its Docket 59-100 in which Middle South Utilities, Inc., Arkansas

Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc. were respondents, has issued an order under authority of the Public Utility Holding Company Act of 1935 directing Louisiana Power & Light Company to divest itself of its natural gas distributing properties in Louisiana, and

Whereas, Louisiana Power & Light Company in consequence of such order has applied to this Commission for authority to transfer its Louisiana natural gas distributing properties to a newly-formed corporation known as Louisiana Gas Service Corporation, and

Whereas, heretofore these gas properties have been operated by the personnel of Louisiana Power & Light Company, many of whom also conduct the electric utility operations of that company, and

Whereas, the separation of the gas properties from the electric properties and the transfer of such gas properties to a new corporation will require the creation and establishment of an entirely new organization and staff of employees as well as the acquisition of separate offices and a great deal of new equipment to conduct the gas utility operations, with an inevitable increase in the operating cost of both the electric and gas properties, and

Whereas, such increased operating costs appear to be unnecessary, uneconomic and contrary to the public interest, particularly the interests of the gas and electric customers of Louisiana Power & Light Company,

Now therefore be it resolved, That this Commission immediately apply to the Securities and Exchange Commission for the reopening of the proceedings leading to the issuance of its order above referred to and for the vacation and revocation of the said order; insofar as it directs Louisiana Power & Light Company to dispose of its gas properties; and that the Utilities Division of this Commission be directed to make an immediate investigation of this situation and develop such information as

may be pertinent for submission to the Securities and Exchange Commission in support of the application herein authorized.

(s) HARVEY BROYLES,

Chairman.

(s) WADE O. MARTIN,

Commissioner.

(s) NAT B. KNIGHT, JR.,

Commissioner.

By ORDER OF THE COMMISSION:

Baton Rouge, Louisiana, November 30, 1954

C. W. COLEMAN,

Secretary.

A true copy.

C. W. Coleman,

Secretary.

Exhibit K

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

At a session of the Louisiana Public Service Commission held at its offices in Baton Rouge, Louisiana, on June 9, 1953, certain questions arose as to the degree of control which this Commission should exercise over sales, leases, mergers, consolidations, and changes of control of public utilities subject to its jurisdiction.

The Commission having been vested by the Constitution of 1921 with all necessary power and authority, among other things, to supervise, govern, regulate and control all street railroads, telephone, telegraph, gas, electric light and power, water works, and common carrier pipe lines, hereby recognizes the present ownership of every such public utility now coming under its jurisdiction in accordance with annual reports on file with this Commission for the year ended December 31, 1952, or for such fiscal year ended in 1952 as may be applicable.

The attention of the Commission has been called to the fact that utility systems have, in the past, been sold or otherwise effected change of ownership or control without authority and

without the knowledge of the Commission or any member of its staff until after such sale or change of ownership has been consummated, and it is hereby:

Ordered, that from the date of this order, the sale, lease, merger, consolidation, or other change in the ownership of the assets of public utilities or any controlling part thereof subject to the jurisdiction of this Commission is hereby prohibited without first having obtained an order of authority from the Commission for such change in ownership.

(Signed) HARVEY BROYLES,
Chairman.

(Signed) WADE O. MARTIN, SR.,
Commissioner.

(Signed) NAT B. KNIGHT, JR.,
Commissioner.

BY ORDER OF THE COMMISSION:

Baton Rouge, Louisiana, June 16, 1953.

(Signed) C. W. COLEMAN,
Secretary.

Exhibit L

[Copy]

STATE OF LOUISIANA
EXECUTIVE DEPARTMENT
BATON ROUGE

FEBRUARY 10, 1955.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D. C.

GENTLEMEN: In your Docket 59-100, in which Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc. were respondents, you have issued an order under authority of the Public Utility Holding Company Act of 1935 directing Louisiana Power & Light Company to divest itself of its natural gas distributing properties in Louisiana.

For many years Louisiana Power & Light Company has operated in the electric and natural gas utility business in

numerous localities throughout Louisiana and has rendered very satisfactory service in these fields. Throughout the years they have built up a very efficient organization which handles both the gas and electric phases of the business. Since the same supervisory, engineering, accounting and other personnel handle both the gas and electric business, and to a great extent the same equipment (particularly automotive equipment) is used in both, the company has been able to operate at considerably lower cost than would have been the case had the two businesses been operated separately.

To us in Louisiana it seems inevitable that upon the divestment by Louisiana Power & Light Company of its gas properties, and the subsequent operation of those properties by another independent company with an entirely different organization, increased operating costs in rendering these utility services to the public must follow. The cost to Louisiana Power & Light Company of rendering electric utility service alone, and to the new company of rendering gas service alone, cannot possibly, as we see it, be as economical as if the two were operating together as at present.

With these increased operating costs pressure would of course be exerted upon our Public Service Commission to grant increases in the retail rates for these electric and gas services to the public, and my concern with this matter springs primarily from my interest in the consumers being served by this utility.

I am informed that the Louisiana Public Service Commission has filed with you a petition seeking reconsideration of your orders in this and certain related cases. I sincerely hope that this petition will receive your favorable consideration, for I feel certain that further analysis of this situation, particularly in the light of the evidence which our Public Service Commission expects to present, will convince you that the best interests of the public will be served by permitting Louisiana Power & Light Company to retain and operate both its electric and natural gas services.

With best wishes, I am

Sincerely,

Robert F. Kennon.
ROBERT F. KENNON.

Exhibit M

A RESOLUTION

Whereas, the Louisiana Power and Light Company has been ordered by the Securities and Exchange Commission, a bureau of the Federal Government, to divest itself of all of its utility properties with the exception of the electric; and

Whereas, this would have the Louisiana Power and Light Company sell its gas properties which include its distribution system and other facilities in many towns and parishes in the state; and

Whereas, the Louisiana Power and Light Company is one of the largest taxpayers in Franklin Parish, Louisiana, and its rates are fair and just and its service excellent;

Therefore, be it resolved, that the Police Jury of Franklin Parish, Louisiana, go on record as being opposed to any such separation and beg the Louisiana Public Service Commission to protest this order from the Securities and Exchange Commission ordering Louisiana Power and Light Company to separate its gas properties.

This resolution was offered by Mr. Ellerman, seconded by Mr. Carter, and passed with the following yea and nay vote:

Yea: Turner
Lee
O'Brien
McIntyre

Garner
Peoples
Ellerman

Carter
Sanders
Tarver

Nay:

Absent: McCat

Adopted and approved this 1st day of February, A. D. 1955.

P. B. TURNER,
President.

Attest:

W. R. Wherland,
Clerk.

Exhibit M is representative of Exhibits M through Exhibits III inclusive, which are not printed herein. These consist of letters and resolutions from the following municipalities:

- Police Jury of Franklin Parish (Exhibit M).
- Police Jury of Concordia Parish—Ward 7 (Exhibits N-1 through N-3 inclusive).
- Police Jury of East Carroll Parish (Exhibit O).
- Police Jury of West Carroll Parish (Exhibit P).
- Police Jury of Jackson Parish (Exhibit Q).
- Police Jury of Madison Parish (Exhibit R).
- Police Jury of Morehouse Parish (Exhibit S).
- Police Jury of Plaquemines Parish (Exhibit T).
- Police Jury of Richland Parish (Exhibit U).
- Police Jury of St. Bernard Parish (Exhibit V).
- Police Jury of St. Tammany Parish (Exhibit W).
- Police Jury of Tangipahoa Parish (Exhibit X).
- Police Jury of Livingston Parish (Exhibit Y).
- Police Jury of St. Charles Parish (Exhibit Z).
- Village of Albany (Exhibit AA).
- Town of Amite City (Exhibit BB).
- City of Bastrop, Parish of Morehouse (Exhibit CC).
- Village of Bonita (Exhibit DD).
- Village of Collinston (Exhibit EE).
- City of Covington (Exhibit FF).
- Town of Delhi (Exhibit GG).
- Village of Delta (Exhibit HH).
- Village of Epps (Exhibit II).
- Town of Ferriday, Concordia Parish (Exhibit JJ).
- Village of Gilbert (Exhibit KK).
- City of Gretna (Exhibit LL).
- City of Hammond (Exhibit MM).
- City of Harahan (Exhibit NN).
- Village of Hodge (Exhibit OO).
- Town of Independence (Exhibit PP).
- Town of Jonesboro (Exhibit QQ).
- City of Kenner (Exhibit RR).
- Town of Lake Providence (Exhibit SS).
- Town of Mandeville (Exhibit TT).

Town of Mangham (Exhibit UU).

Village of North Hodge (Exhibit VV).

City of Oak Grove (Exhibit WW-1 through 3 inclusive).

Town of Ponchatoula (Exhibit XX-1 through 2 inclusive).

Town of Rayville (Exhibit YY).

Town of Slidell (Exhibit ZZ).

City of Tallulah (Exhibit AAA).

City of Westwego (Exhibit BBB).

Town of Winnsboro (Exhibit CCC).

Village of Wisner (Exhibit DDD).

Community of Baskin (Exhibit EEE).

Police Jury of Jefferson Parish (Exhibit FFF).

Police Jury of Jefferson Parish (Exhibit GGG).

Police Jury of Jefferson Parish (Exhibit HHH).

Police Jury of Jefferson Parish (Exhibit III).

(File endorsement omitted.)

Before the Securities and Exchange Commission

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT
COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW
ORLEANS PUBLIC SERVICE, INC., RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION
(File No. 54-139)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY,
LOUISIANA GAS SERVICE CORPORATION

(File No. 70-3315)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY
(File No. 31-620)

(Public Utility Holding Company Act of 1935)

Brief on behalf of Louisiana Public Service Commission

(Filed May 2, 1955)

May it please the Commission:

A. Background summary

Under date of March 20, 1953, the Securities and Exchange Commission (herein called the SEC), after hearing, entered its Order in proceedings File No. 59-100 and File No. 54-139, directing, among other things, that, Louisiana Power & Light Company (herein called Louisiana) to dispose of its non-electric properties. The Louisiana Public Service Commission (herein called the Commission) did not take part in the hearing before SEC preceding this order, not having at that time made a study of the effects of a disposition by Louisiana such as was subsequently ordered by SEC. Under date of June 16, 1953, the Commission entered its order prohibiting any utility subject to its jurisdiction from disposing of any of its utility assets subject to its jurisdiction, without first obtaining the Commission's consent.

Under date of November 13, 1954, Louisiana applied to the Commission for permission to dispose of its non-electric properties by transferring the same to a specially formed subsidiary corporation (Louisiana Gas Service Corporation) under a plan which Louisiana had previously submitted to SEC in its Application-Declaration filed with SEC under date of November 10, 1954, in Files Nos. 70-3315 and 31-620.

After a preliminary study of the effects of such disposition proposed by Louisiana, under date of December 22, 1954, the Commission, by telegram, requested the SEC for a public hearing in regard to the proposed plan, and for a reopening of File No. 59-100 and File No. 54-139.

Under date of January 21, 1955, the SEC advised the Commission that the SEC would entertain an offer of proof and a brief, if filed on or before March 1, 1955. This date for filing was subsequently extended until May 1, 1955. This brief and the accompanying Offer of Proof are filed in response to said letter of January 21, 1955, as extended.

B. Position of the Commission

The Commission respectfully represents that the SEC should permit a public hearing with respect to Louisiana's Application in Files Nos. 70-3315 and 31-620, and permit the reopening of Files Nos. 59-100 and 54-139 for the purpose of receiving important new evidence to be offered by the Commission, not available at the time of the hearings therein, and for the purpose of hearing additional arguments not heretofore presented. The Commission's position is based on the following propositions:

I. The Commission proposes to introduce facts and present arguments not considered by the SEC at the hearing which resulted in its Order dated March 20, 1953.

II. In the light of the additional evidence which the Commission will present, it will be clear that the conditions of Section 11 (B) (1) of the Public Utility Holding Company Act of 1935 will be complied with in the retention by Louisiana of its gas properties.

III. The legislature history of the Public Utility Holding Company Act shows that the question of whether gas and electric services should be retained in one company is a matter primarily of State policy; the policy of the State of Louisiana favors such retention.

IV. The public interest is best served by the retention of the gas properties by Louisiana.

V. From an over-all point of view, it would appear that the Public Utility Holding Company Act has accomplished its purpose with respect to this utility and that further disintegration will only prove harmful.

pose of its non-electric properties pursuant to Section 11 (b) (1) of the Act.

4.

Petitioner seeks a review of the order of Commission dated September 13, 1955 made in its proceedings entitled:

"In the Matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc., Respondents, File No. 59-100; Electric Power & Light Corporation, File No. 54-139; Louisiana Power & Light Company, Louisiana Gas Service Corporation, File No. 70-3315; Louisiana Power & Light Company, File No. 31-620. (Public Utility Holding Company Act of 1935)."

8.

5.

This Court has jurisdiction in this matter under the provisions of Section 24 (a) of the Act and under the provisions of the administrative Procedure Act (5 U. S. C. A., Sec. 1009, et seq.).

6.

Louisiana Public Service Commission avers that the Commission's order of September 13, 1955 is erroneous, capricious, arbitrary, contrary to the law and the evidence, and constitutes an illegal exercise of power by the Commission; said order should be reviewed by this Court and set aside, and the matter should be remanded to the Commission for further proceedings and further consideration; and in due course the Commission should set aside its order of March 20, 1953 and should hold that under the provisions of the Act, Section 11 (b) (1) the Louisiana Power & Light Company should not be required to dispose of its non-electric properties;

That this Court should stay the effectiveness of the order of September 13, 1955 and the order of March 20, 1953 pending final disposition of this petition to review. A separate petition for stay is being filed contemporaneously with this petition and is requested on the grounds set forth herein;

That the Court should order and direct that a certified copy of this petition to review be forthwith served by the Clerk of

C. The Commission proposed to introduce facts and present arguments not considered by the SEC at the hearing which resulted in its Order dated March 20, 1953

As set out in the Commission's Offer of Proof, the Commission has caused its staff to make a detailed separation study, a summary of which is attached to the Offer of Proof as Exhibit B. A great deal of the time has been spent on this study by the staff of the Commission, and it covers all phases of the operations of Louisiana. It not only represents a study of the Home Office records of Louisiana, but reflects investigations made at the Division Office and District Office levels. It also reflects the information contained in the records of the Commission, and reflects the experience of the Commission in its regulation of this utility and the familiarity of the staff and members of the Commission with local conditions affecting the properties and their operations.

This is evidence which certainly should be considered by SEC, since it is material of prime relevancy prepared by the public State authority charged with the regulation of this utility and the protection of consumers and the general public.

Indeed, the SEC, in its opinion in connection with its Order of March 20, 1953, gave as one of its reasons for reaching the conclusion which it did:

"No study of any kind was introduced to show what the expense of the gas properties would be if they were to be operated as a separate unit."

This would clearly seem to be reason enough for opening the record for the purpose of receipt of this evidence.

As shown by the summary of this study, Exhibit B, the disposition by Louisiana of its gas properties will result in the loss of substantial economies in the operation of the separated gas system. In its opinion in connection with its Order of March 20, 1953, the SEC commented:

"As indicated, the estimate of loss of economies does not relate directly to the additional expense that might be incurred by a separated gas system, but rather was restricted to the additional expense that might be incurred by the electric properties of Louisiana."

this Court upon the Commission, and that thereupon the Commission shall certify and file in this Court a Transcript
 9 of the Record upon which the orders of September 13, 1955 and March 20, 1953 were entered:

That the Court should grant such other relief as it may deem just and proper.

7.

The Commission's order of September 13, 1955 was entered pursuant to a petition by the Louisiana Public Service Commission for reopening of the proceedings before the Commission under which its order of March 20, 1953 was rendered. The Louisiana Public Service Commission filed an Offer of Proof accompanied by its brief. On July 7, 1955 oral argument was heard before the Commission on said petition of the Louisiana Public Service Commission to reopen the proceedings. The Commission's order of September 13, 1955 denied the petition to reopen the record. This denial constituted error, and the Commission should have reopened the proceedings to hear the evidence, proposed in petitioner's Offer of Proof, and eventually set aside its order of March 20, 1953. Said Offer of Proof set forth the following reasons for reopening and reversal of the Commission's Order (these being the points upon which petitioner intends to rely in this Court):

A. There is no law of the State of Louisiana prohibiting ownership or operation by a single company, such as Louisiana Power & Light Company, of both an electric and a gas utility. Louisiana Power has express approval by petitioner to continue
 10 operation of both its electric and gas systems. It has been the general policy of petitioner not to separate electric and gas utility systems in a company.

B. The provisions of the Act, Section 11-(b) (1), when properly followed by the Commission under the facts set forth in the Offer of Proof, show that (1) both the electric and gas systems of Louisiana Power are located entirely within the territorial limits of the State of Louisiana; (2) the gas system of Louisiana Power cannot be operated as an independent system without the loss of substantial economies; and (3) continued combination of the electric and gas systems of Louisiana

The evidence now offered clearly establishes loss of economies directly related to the additional expense which would be incurred by a separated gas system. Since the SEC has already pointed out the relevancy and importance of such evidence, it would seem clear that the record should be opened to receive this evidence which is now available and is offered by the Commission.

Since the SEC's Order of March 20, 1953, and as a step in compliance with that order, Louisiana caused a study of the separate operations of its gas system to be made by Ebasco Services. This study was made so that a prospective purchaser of these properties would have full information, and so that Louisiana would be able to dispose of the properties on the most advantageous terms obtainable. This study, of course, was not before the SEC at the time of its order of March 20, 1953, but it is now on file with the Commission in Files 70-3315 and 31-620 as Exhibit B-15 to Louisiana's Application-Declaration. This study should be considered by the SEC in connection with Files Nos. '59-100 and 54-139, and those files should be opened for the purpose of receiving this evidence, and SEC's order reconsidered in the light of the additional evidence.

Since the SEC's order of March 20, 1953, the additional cost of debt financing of a separately owned gas system has been accurately established in the market place. Under date of October 27, 1954, Louisiana sold \$18,000,000 principal amount of First Mortgage Bonds, after public bidding, at a net cost of money to Louisiana of 3.11%. At approximately the same time, Louisiana Gas Service Corporation, the company formed to operate the non-electric properties separately, after negotiations with four insurance companies, obtained as its best offer for its First Mortgage Bonds a rate of 3.55%, or a differential of .44% in the cost of first mortgage money for the separate operation of the non-electric properties. This tangible evidence was not available in 1953. Since it is clearly relevant, the record should be opened to receive it and the SEC's order reviewed in the light of this as well as other new evidence.

By like token, it has now been established in the market-place, that the separately operated non-electric properties

would have to carry the cost of sinking fund charges three times as high as those required of a combined operation. This is evidence not available and not considered by the SEC when it entered its order of March 20, 1953.

The Commission also made a study of the effect of seasonal variations in the sales of gas and electric energy, and in Exhibit E to its Offer of Proof offers to show that the variations in the sales of gas and electricity tend to complement each other. This is a factor not previously considered by the SEC.

Since the SEC order of March 20, 1953, sufficient time has elapsed to make available the results of operations of Mississippi Power & Light Company and Arkansas Power & Light Company after the disposition by those companies of their gas properties. Those gas companies serve natural gas in territories adjacent to the system of Louisiana. In Exhibit F, the Commission offers to show the comparative cost of service of Louisiana, Arkansas and Mississippi in the years 1949 and 1954. In the year 1949, all three companies operated both electric and gas services. In the year 1954, Arkansas and Mississippi operated electric services only, and Louisiana operated both gas and electric services. This evidence was not available when the SEC entered its order of March 20, 1953, and should be received and considered at this time.

At the time of the hearings preceding the SEC's order of March 20, 1953, the Commission took no position with respect to the disposition by Louisiana of its gas properties. The Commission at that time had not given full consideration to the effect of such a disposition, and, indeed, had not anticipated that the SEC would order such disposition. Following the entry of the SEC order of March 20, 1953, the Commission did give consideration to the matter and, on June 16, 1953, entered its order (Exhibit K to the Offer of Proof) in anticipation of further study of the matter. Since that time, the Commission has given very careful consideration to the matter and has made the studies hereinabove referred to and described in the Offer of Proof. As a result, the Commission has come to the conclusion that such a disposition would be contrary to the public interest, and contrary to the interests of Louisiana's

customers. It is submitted that the SEC should reconsider its order in the light of the said conclusions of the Commission.

The Commission addressed a letter to each of the Police Juries and Town Councils from which Louisiana holds gas franchises, asking these public bodies their opinion as to whether or not they felt that their territories would be best served by a separate gas company, or, as at present, by Louisiana in combination with its electric operations. As shown in the Offer of Proof, it was with one exception the unanimous conclusion of all of these public bodies that the public would be best served by the retention of the gas properties by Louisiana. We submit that the SEC should reopen the files involved and reconsider its order in the light of the expressions of these public bodies.

In short, it is submitted that the weight of the additional evidence now offered, and not available at the time of the SEC's order of March 20, 1953, is so great that the records in Files 59-100 and 54-139 should be reopened for reception of such evidence, and the order of March 20, 1953 reconsidered in the light of such evidence.

D. In the light of the additional evidence which the Commission will present, it will be clear that the conditions of Section 11 (B) (1) of the Public Utility Holding Company Act of 1935 will be complied with in the retention by Louisiana of its gas properties

There would appear to be no serious contention that the standards of subsections (B) and (C) of Section 11 (B) (1) are met in the retention of this gas system by Louisiana, and in this connection reference is made to paragraphs V and VI of the Offer of Proof. The maps, Exhibits G1, G2 and G3, demonstrate that the properties are all located in Louisiana, that the size of the gas system is such as to conform with the standards of subsection (C), and that the gas system is an integrated system within the meaning of Section 2 (a) (29) (B) of the Public Utility Holding Company Act. The only matter, therefore, to consider is whether the proposed additional gas system cannot be operated as an independent system without

the loss of substantial economies presently enjoyed. In the Commission's Offer of Proof, it is shown through a detailed separation study that there will be an over-all annual loss of economies in the operation of the systems separately totalling \$957,193. The Commission considers this loss of economies both substantial and important. In the operation of the gas system alone, the annual loss of economies amounts to \$272,816. This loss of economies in the operation of the gas system alone is considered by this Commission substantial and important. In addition to these losses of economies in operation, the separate operation of the gas properties would be burdened with additional cost of debt financing, as is clearly demonstrated in the Offer of Proof, and would additionally be saddled with added costs of equity financing. In the Offer of Proof, it has been demonstrated that the sinking fund requirements of a separate operation would be three times as large. In its opinion in connection with its order of March 20, 1953, the SEC suggests that only those economies related to the additional system should be considered. It is submitted, however, that when loss of substantial economies in the separated gas system have been proven, as will be the case here, that failure to take into consideration also the loss of economies in the principal electric system constitutes a shutting of one's eyes to reality. Certainly this Commission is very much concerned about the loss of economies in the retained system as well as the loss of economies in the new separated system, since it is its public duty to protect the ratepayers of Louisiana served by utilities under its jurisdiction.

It is suggested in the SEC opinion that even if the loss of economies to the principal electric system were a relevant factor, this loss should have been based upon all the electric operations of Middle South Utilities. The loss of economies to the principal electric system of Louisiana Power & Light Company will have to be borne by the ratepayers in Louisiana outside of the area served by New Orleans Public Service, and none of the ratepayers of Mississippi or Arkansas or the territories served by New Orleans Public Service will be concerned in the least bit with these losses of economies. This Commission is not concerned with the loss of economies of the other

companies in the Middle South system, and the loss of such economies would appear to have absolutely no relevancy to the question here before the SEC. As was said in *The North American Company*, 11 SEC 194, 208:

"The phrase 'substantial economies' in Clause A refers to economies which may be secured by the systems themselves rather than economies which may be secured by the holding company. This was the clear intent of Congress (see H. R. Rep. No. 1903, 74th Cong., 1st Session, 1935, p. 71) and in fact argument by all counsel in this case has been premised on this view."

In its opinion in connection with its order of March 20, 1953, SEC cites: *North American Company v. SEC*, 11 SEC 194, 133 F. 2d 148, aff. 327 U. S. 686; *Engineers Public Service Company*, 12 SEC 41, 138 F. 2d 936; *The Philadelphia Co. v. SEC*, Holding Company Act Release No. 8242 (June 1, 1948), 177 F. 2d 720. It is submitted that none of these cases are controlling of the present case.

In the *North American Company* case, there was no such showing of substantial economies as has been demonstrated in this case. Although a figure for loss of economies was given, the SEC states:

"There is no indication of the method by which this figure has been calculated." (11 SEC 217)

In this *North American Company* case, the loss of substantial economies urged as the basis for retention of the gas system were the loss of direct financial assistance from the holding company and the loss of interchange of statistics and operating information. The Court, in its decision, said that such an issue is one on which a court cannot review and reweigh the evidence. This is not the situation here, inasmuch as it is the duty of the SEC to weigh and reweigh evidence on this issue, and the opinion of this Commission, the administrative agency most closely involved in the regulation of this utility, should be given great weight by SEC, just as the findings of SEC on this issue are given great weight by the Courts. In the *North American* case, it was also found that the standards of Clause C were not met, and this in part was the basis of this decision.

In the case of *Engineers Public Service Co. et al. v. SEC*, supra, the estimated loss of economies were much smaller in amount than in the present case, and the only estimates were those prepared by executives of the utility company itself. In this instance, the estimates have been prepared by the public regulatory body having jurisdiction over the utility involved. In the *Engineers Co.* case, the Commission found that the record would not sustain more than half of the claimed economies. In concluding that these losses of economies were not "important", the Court said:

"But Congress was not so much concerned with the profit motive of utilities as with the evils that have become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases." It is submitted that the ultimate purpose of Congress in seeking to wipe out the evils inherent in the holding company system was the protection of the general public consuming and paying for the ultimate utility services. In the present case, it is amply clear that no evil will be cured by the disposition of these gas properties, while, on the contrary, it is amply clear that the ratepayers will in the long run be harmed.

In this same *Engineers Public Service* case, in considering the retainability of the Gulf States gas system as an additional system, where it was shown that the additional cost of operating as an independent gas company would be \$42,024, the Court states:

"In the opinion of the writer, the admitted facts establish the retainability of the gas system as an additional system if Gulf States is chosen as the principal system."

We respectfully call your attention to the language of the minority opinion in this case, which we quote for convenience, in part, as follows (138 F. 2d 944):

"The majority opinion on this subject does not seem to give sufficient effect to the obvious intent of Congress to protect an established association of public utility systems under common control when it is found to satisfy the standards

of substantial economy, restricted geographic location and moderate size described in paragraphs A, B and C respectively of P. 11 (b) (1). It is the opinion of the writer that the Commission is directed by the statute to give as much weight to these paragraphs as to the provisions of the section immediately preceding, which require the limitation of the holding company system to a single integrated system with certain additions. This conclusion is reasonable because the evils which the statute was designed to eradicate do not prevail under the conditions described in the lettered paragraphs; and it is certain, as the legislative history shows, that the Act would not have received the approval of Congress if it had not contained the provisions which prohibit the unnecessary disturbance of existing conditions.

"If the terms of paragraph (A) are given normal meaning and weight, it is hard to understand why substantial savings in operational expenses do not amount to the 'substantial economies' upon which the application of the paragraph depends. The findings of fact by the Commission are of course conclusive, if supported by substantial evidence, P. 24; but in this instance the evidence is undisputed and it remains only to decide whether a loss of substantial economies would result from a severance of the two systems. It is putting it too strongly to say, as the Commission did, that there must be clear and convincing evidence of loss of economies which would seriously impair the efficiency of the systems. The Act does not require more than a preponderance of evidence to support such a finding; *nor does it require that the economies must be so great that their loss would seriously impair the system. Such a loss would not be merely substantial; it would be destructive.*"

The case of *The Philadelphia Company et al v. SEC* involved the dissolution of a holding company, as contrasted to the present case which simply involves the disposition of properties by a subsidiary. In this case, the Commission simply held that the burden of proof of establishing loss of substantial economies had not been borne, since it found defective the methods and assumptions by which the conclusion of the Company's witnesses had been reached. The Court simply held that it would

not go behind the findings of the administrative agency. The situation involved in *The Philadelphia Company* case is greatly different from the one involved here. In the case of Louisiana, its gas system is serving numerous small communities scattered over parts of the State of Louisiana, which presents an entirely different operational problem from a system serving a large metropolitan community or large metropolitan communities. We agree with the Court that "substantial" is a relative term, but submit that the loss of economies here involved, as it relates to Louisiana, is definitely substantial.

E. The legislative history of the Public Utility Holding Company Act shows that the question of whether gas and electric services should be retained in one company is a matter primarily of State policy; the policy of the State of Louisiana favors such retention

It should be noted at the outset that the Commission has full jurisdiction over all of the retail gas and electric rates of Louisiana, except those for electric service in the 15th Ward of the City of New Orleans. The Commission has found that its regulation is effective and in no way circumvented by the mere fact that Louisiana is a subsidiary of Middle South Utilities. The matter of competition in the field of distribution of gas and electric energy is, as stated in *Re Northern States Power Company*, 6 P. U. R. 3rd, p. 48, "essentially a question of State policy". This is illustrated in the legislative history of the Public Utility Holding Company Act. In Senate Report 621, 74th Congress, 1st Session, pp. 29 and 30, the following is to be found:

"The restrictions of this section apply only to acquisition of interests in the future and are fourfold: (1) To confine, as to the future, the activities of public-utility holding companies to those essentially connected with, or necessarily incidental to, the operation of gas and electric utilities; (2) to prevent the future indiscriminate combination of domestic and foreign utilities in order to avoid the injury to investors which come from the fact that the underlying foreign utilities are not subjected to the same type of State regulation as domestic operating com-

panies and represent an entirely different type of investment; (3) to prevent the use of the holding company in the future to deny to the public the wide-spread and economic use of both natural gas and electric energy merely because it is to the selfish advantage of a given company to foster the use of one of its products as against the other and deprive the public of the benefits of competition between the two; and (4) *to prevent the use of the holding device in the future to evade State laws which prohibit the common control in a single utility of the gas and electric utilities serving the same territory.*

"Subsection (a) covers the first category of restriction set forth above—registered holding companies are not permitted to acquire in the future any interest in any business other than (1) the business of a public utility company as such, and (2) subject to such limitations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers or to protect acquisitions detrimental to the carrying out of any provision of Section 11, a business reasonably incidental, or necessary or appropriate to the economical and efficient conduct of a business in which the holding company is lawfully engaged or has an interest. *These provisions are so designed as not to interfere with State policy which allows or fosters the carrying on of waterworks, traction-business, bus systems, etc., by electric and gas utilities so long as that policy will not deter the carrying out of the provisions of Section 11.*

"Subsection (b) is concerned with the unfair subordination of the production and transportation of natural gas to the production and distribution of electric energy, and vice versa. It prohibits in the future the acquisition, in the same holding company system, of electric or gas utilities and facilities for the transportation of natural gas in interstate commerce or for the production of natural gas, except to the extent that the acquisition is necessary or appropriate to serve the requirements of the public utilities in the system.

"Subsection (d), in line with this same basic policy, prevents the bringing into the same holding company system of a gas-utility company and an electric-utility company serving sub-

stantially the same territory where *State law prevents the combination of the gas utility and electric utility in the same company. This subsection is concerned with competition in the field of distribution of gas and electric energy—a field which is essentially a question of State policy, but becomes the proper subject of Federal action where the extra-State device of a holding company is used to circumvent State policy.*"

It is true that the above comment is with reference to Section 8 of the Act relating to the acquisition of properties, and it is also true that in *The Philadelphia Company* case, *supra*, it is pointed out that Section 8 does not specifically authorize the acquisition of gas systems. Nevertheless, the Act must be construed as a whole, and the reasoning behind the provisions of Section 8 relating to the acquisition of gas systems by electric holding company systems must be the same as that governing the disposition of such systems pursuant to Section 11 (B) (1). These cannot in reason be two different standards for these two sections. Perhaps the reason why the combination of gas and electric properties was considered primarily a matter of State policy was that one of the primary objectives of the Holding Company Act was to make regulation of public utilities at the State level more effective. This is brought out in the comment of Senator Sisson at 79 Congressional Record, 10540 (1935):

"Mr. Sisson. * * * Now, the holders of the stock of the Niagara Hudson Power Corporation are not affected by this bill—either the House bill or the Senate bill or the bill either with or without the elimination of the so-called 'death penalty' provision clause. Its business is purely intrastate. *But what we are hoping is that when we get the holding companies in a position where they can be properly regulated, as they can be by only Sections 11 and 13 of the Senate bill in this legislation, that we may then look to the States for proper regulation of the operating companies.*"

6 In United States Court of Appeals for the Fifth Circuit.
Louisiana Public Service Commission, Petitioner;

vs. Number 15820.

● Securities and Exchange Commission, Respondent.

To the Honorable the United States Court of Appeals for the Fifth Circuit:

The petition of the Louisiana Public Service Commission respectfully represents:

1.

Petitioner is an agency of the State of Louisiana; its domicile and principal place of business is at Baton Rouge, Louisiana within the jurisdiction of this Court.

Under the Constitution and laws of Louisiana (Louisiana Const. 1921, Art. 6, Sec. 4, La. R. S. 1952, Title 45, Sec. 1161, et seq.) said Louisiana Public Service Commission has all necessary power and authority to regulate both electric and gas utility companies operating throughout the State of Louisiana. As such, petitioner has exercised jurisdiction, and continues to do so, over all the retail electric and gas rates of Louisiana Power & Light Company.

2.

7 The Securities and Exchange Commission, hereinafter referred to as the Commission, established under Section 4, Title 1 of the Securities and Exchange Act of 1934, is charged with the administration of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. Sec. 79, et seq. (The Act).

3.

On September 13, 1955, the Commission entered its order pursuant to Section 11 (b) (1) of the Act denying the petition of the Louisiana Public Service Commission insofar as it requested the reopening of the proceedings in which the Commission's order of March 20, 1953 was entered. By said order of March 20, 1953, the Commission directed Louisiana Power & Light Company, hereinafter referred to as Louisiana Power, which is engaged in the electric, gas and water business, to dis-

Power does not result in a system so large as to impair the advantages of localized management, efficient operation, or effectiveness of regulation.

Petitioner proposed in its Offer of Proof to show that the total additional cost of the rate-payers of Louisiana which would result from the separation of the gas and electric systems of Louisiana Power would be \$957,193 annually, of which \$684,377 would be additional cost to Louisiana Power's electric customers, and \$272,816 would be additional cost to the gas customers. The exhibits submitted in connection with the Offer of Proof were prepared by the experienced full time staff of public utility investigators who made a separation study of the affairs of Louisiana Power and submitted the results in exhibit form attached to the Offer of Proof.

C. The Commission has held that loss of economies, as provided for under Section 11 (b) (1) (A) of the Act, relate only to the additional (gas) system and do not relate to the loss of economies to the electric customers. It persists in said holdings despite the intent of the Act considering it in its entirety, and without reference to the public interest. The loss of \$684,377 of economies in the electric operations must be paid for by the electric customers should the separation of properties be finally consummated pursuant to the Commission's orders.

D. Petitioner, the Louisiana Public Service Commission, is experienced in rate investigations and has a duty to protect and preserve the public interest in Louisiana, which results in a duty to the electric customers as well as the gas customers of Louisiana Power. It views with much apprehension the loss to Louisiana ratepayers of \$957,193 per year which will result, according to its Offer of Proof and exhibits attached thereto, if the Commission's order of separation is finally consummated. It is joined in this apprehension by the principal governmental officials of the State of Louisiana concerned with the operation of Louisiana Power in the territory it serves; these include the Governor of the State, the officials of 28 of the 30 towns and communities served, and of 14 of the 15 parishes served by Louisiana Power.

E. The Commissioner erred in interpreting the Act and in applying the provisions of Section 11 (b) (1) of the Act. It should have reopened the proceedings in the petition of Louisiana Public Service Commission, received the evidence set forth in petitioner's Offer of Proof, and reversed its order of March 20, 1953 requiring Louisiana Power to dispose of its nonelectric power properties, because the previous findings of the Commission are not supported by substantial evidence.

12 Wherefore, petitioner prays for a review of the Commission's orders as above set forth, that these proceedings be remanded to the Commission to receive the evidence submitted in petitioner's Offer of Proof, and in due course the Commission's order of March 20, 1953 should be set aside insofar as it orders Louisiana Power & Light Company to dispose of its non-electric properties; that all proceedings before the Commission should be stayed pending the determination of this review and for a reasonable time thereafter; and that such other relief be granted to petitioner as the Court may deem just and proper.

(Signed) ROBERT A. AINSWORTH, JR.,
Of AINSWORTH & AINSWORTH,
Attorneys for Petitioner, Louisiana Public Service Commission.

1650 National Bank of Commerce Bldg.,
New Orleans, Louisiana.

In the United States Court of Appeals for the Fifth Circuit.

ORDER TO FILE PETITION. October 12, 1955.

(Title omitted.)

13 A petition for review of an Order of the Securities and Exchange Commission dated September 13, 1955, "In the Matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc., Respondents, File No. 59-100; Electric Power &

Light Corporation, File No. 54-139; Louisiana Power & Light Company, Louisiana Gas Service Corporation, File No. 70-3315; Louisiana Power & Light Company, File No. 61-620. (Public Utility Holding Company Act of 1935)", having been presented to this Court;

It Is Ordered that said petition be filed and docketed as of October 12, 1955,

And It Is Further Ordered that a copy of this Order and said Petition be forthwith served upon the Securities and Exchange Commission, and that said Securities and Exchange Commission, upon service of such copies, forthwith certify and file in this Court, a transcript of the record in the proceedings in conformity to Rule 38, as amended, of this Court.

JOHN A. FEEHAN, JR.,

Clerk, U. S. Court of Appeals,
Fifth Circuit,

By (Signed) CLARA R. JAMES,
Chief Deputy Clerk.

New Orleans, Louisiana, October 12, 1955.

14 In United States Court of Appeals for the Fifth Circuit.

**CERTIFICATE LISTING AND DESCRIBING RECORD
IN PROCEEDINGS BEFORE SECURITIES AND EX-
CHANGE COMMISSION.—Filed Nov. 10, 1955.**

(Title omitted.)

Pursuant to the provisions of Section 24 (a) of the Public Utility Holding Company Act of 1935 and Rules 38 and 39 of this Honorable Court, the Securities and Exchange Commission, respondent herein, certifies that the following list of transcripts of testimony, exhibits, documents and other materials, all as described in said list, comprise the record upon which the orders complained of by petitioner were entered:

I. The Evidence.

**Document
No.**

1. Transcripts of hearing held February 19, 1953 and February 20, 1953.

2 Middle-South

Exhibit No.

Description

D-1

Document entitled, "Middle South Utilities, Inc.—
Historical Financial and Operating Data."

3

D-2

Document entitled, "Middle South Utilities, Inc.—
Financial and operating data 1949."

15]

4

D-3

Document entitled, "Middle South Utilities, Inc.—
Financial and operating data 1950."

5

D-4

Document entitled, "Middle South Utilities, Inc.—
Financial and operating data 1950."

6

D-5

Document entitled, "Middle South Utilities System—
Electric revenues, sales, customers and unit data
by classifications" (years 1950, 1951, 1952).

7

D-6

Document entitled, "Middle South Utilities System—
Electric-Industrial Revenues by major types of
industry year 1952."

8

D-7

Financial statements consisting of consolidating
balance sheet, consolidating statement of income,
consolidating summary of surplus, and notes to
financial statements, December 31, 1952—Middle
South Utilities, Inc. and subsidiaries.

9

D-8

Map dated December 1925, showing properties con-
stituting Middle South System.

10

D-9

Map dated December 1937 showing properties con-
stituting Middle South System.

11

D-10

Map dated January 1943 showing properties con-
stituting Middle South System.

[16]

12

D-11

Map dated January 1953 showing properties con-
stituting Middle South System.

13

D-12

(Document entitled, "1949 Annual Report—Middle
South Utilities, Inc.")

14

D-13

(Document entitled, "1950 Annual Report—Middle
South Utilities, Inc.")

15

D-14

(Document entitled, "Annual Report 1951—Middle
South Utilities, Inc.")

16

D-15

Document entitled, "Newsyear—Arkansas: 1949—
Annual Report—Arkansas Power & Light Com-
pany." [erroneously referred to as Exhibit D-21
at page 18 of transcript]

17

D-16

Document entitled, "Annual Report 1950—Arkansas
Power & Light Company." [erroneously referred to
as Exhibit D-22 at page 18 of transcript.]

Docu- ment No.	Middle-South Exhibit No.	Description
18	D-17	Document entitled, "Arkansas Newsreel—1951 Annual Report—Arkansas Power & Light Company." [erroneously referred to as Exhibit D-23 at page 18 of transcript.]
19	D-18.	(Document entitled, "1949 Annual Report—Louisiana Power & Light Company."
[17] 20	D-19	(Document entitled, "1950 Annual Report—Louisiana Power & Light Company."
21	D-20	(Document entitled, "1951 Annual Report—Louisiana Power & Light Company."
22	D-21	(Document entitled, "Mississippi Power & Light Company—1949 Annual Report."
23	D-22	(Document entitled, "1950 Annual Report—Mississippi Power & Light Company."
24	D-23	(Document entitled, "1951 Annual Report—Mississippi Power & Light Company."
25	D-24	Document entitled, "New Orleans Public Service Inc.—Annual Report" (1949).
26	D-25	Document entitled, "Annual Report—New Orleans Public Service Inc. 1950."
27	D-26	Document entitled, "Annual Report 1951—New Orleans Public Service Inc."
28	D-27	Document entitled, "Mississippi Power & Light Company—Reconciliation of operating expenses as shown in S-1 filed to be effective March 6, 1953 with operating expenses by classified accounts."
[18] 29	D-28	Document entitled, "Mississippi Power & Light Company—Electric operating costs exclusive of production and transmission."
30	D-29	Document entitled, "Mississippi Power & Light Company—Estimated effect of wage increase Year 1952."
31	D-30	Document entitled, "Mississippi Power & Light Company—Operating expenses, excluding production & transmission electric department."
32	H-1	Map entitled, "Map of Greater New Orleans Louisiana."
33	H-2	Map entitled, "Middle South Utilities, Inc. Electric System Map."
34	H-3	Document entitled, "Middle South System—Electric Generating Stations."

Docu- ment No.	Middle-South Exhibit No.	Description
35	H-4	Document containing generating station statistics taken from FPC-1 reports of Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc.
36	H-5	Document entitled, "Middle South Systems—System Peak Demand and System Input for year 1952."
[19] 37	H-6	Document entitled, "Middle South System—Maximum Individual Company Hourly Demand and System Diversity for Year 1952."
38	H-7	Map entitled, "Middle South Systems—Proposed and Future Microwave System," dated February 11, 1953.
39	H-8	Document entitled, "Middle South Systems—Energy flows on intercompany connections"—1952.
40	H-9	Documents entitled, "Middle South Systems—Scheduling of power supply sources for system load—Actual operations for February 14, 1952" and "Middle South Systems—Scheduling of Power Supply sources for system load actual operations for June 27, 1952."
41	H-10	Document entitled, "Middle South Systems—Purchases from outside sources," 1952, and "Middle South Systems—Sales to outside companies for joint account," 1952.
42	H-11	Document entitled, "New Orleans Public Service Inc.—Electric schedule (Public Utility—2)".
43	H-12	Document entitled, "Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company—Memorandum re administration of intrasystem transactions and system planning and development."
[20] 44	H-13	Document entitled, "Summary of intercompany transactions under Louisiana Power & Light Company rate schedule FPC 5 and attached memorandum agreement Year 1952." (only the one sheet was put in evidence, not memo "attached".)
45	H-14	Documents entitled, "Energy sales and revenues between Middle South system companies year 1952" and "Middle South Systems—Revenues from outside companies from joint account sales year 1952."
46	N. O. 1	Document entitled, "Report to Honorable Rufus E. Foster, Judge of the United States Court by Citizens' Advisory Committee on Public Utilities—Hugh McCloskey, Chairman—March 23, 1921."

72 S. E. C. VS. LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

Document No.	Middle-South Exhibit No.	Description
47	N. O. 2	Pamphlet entitled, "New Orleans Public Service Inc.—New Orleans, La." containing copies of Act 94 of 1921 Louisiana State Legislature, and Ordinances Nos. 6822, 7067, 7068, 7069 and 8423 C. C. S. of the City of New Orleans, La.
48	N. O. 3	Document entitled, "A comparison of annual cost of electric, gas and transit services in New Orleans computed at rates prevailing in cities with population ranging between 300,000 to 1,000,000."
49	N. O. 4	Document entitled, "New Orleans Public Service Inc.—Natural gas revenues, sales and customers—year 1952."
50	N. O. 5	Document entitled, "New Orleans Public Service Inc.—Transit revenues and passengers carried—Year 1952."

Turner's Exhibit No.

51	1	Map entitled, "Louisiana Power & Light Company System Map."
52	2	Map entitled, "State of Louisiana."
53	3	Chart showing organization of Louisiana Power & Light Company together with certain statistics relating to company's operation.
54	4	Document entitled, "Louisiana Power & Light Company—Meters and personnel by class of service December 31, 1952."
55	5	Document entitled, "Louisiana Power & Light Company—Comparison of District Operating Costs 12 months ended September, 1952—Single Service vs. Combination Service."
56	6	Aerial photograph taken in November, 1951, of metropolitan New Orleans area.
[22] 57	7	Document entitled, "Louisiana Power & Light Company Gas Operations 12 months ended December, 1952."
58	8	Map entitled, "Communities in Louisiana Receiving Natural Gas," with sheets attached headed "List of Gas Companies from AGA Rate Book."
59	9	Document entitled, "Louisiana Power & Light Company—Comparison of costs—12 months ended September 1952—Single Service vs. Combination Service with three (3) largest districts eliminated."
60	10	Document entitled, "Louisiana Power & Light Company—Comparison of Costs—12 months ended September 1952—Single service vs. Combination Service."
61		Incorporated by Reference Page 95 of transcript of hearing held February 19, 1953: Form U5S report of Middle South Utilities for the year 1951 (File No. 30-225).

[23] II. Documents in the Nature of Pleadings and
Procedural Rulings thereon

Document No.	Description
62	Order of this Commission dated January 29, 1953 convening hearing pursuant to Section 11 (b) (1), in the matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc., Respondents, File No. 59-100, and Electric Power & Light Corporation, File No. 54-139 (Public Utility Holding Company Act of 1935).
63	Post Office Return Receipt No. 812868 showing delivery on February 9, 1953 of order of this Commission dated January 29, 1953 on the Louisiana Public Service Commission.
64	Affidavit and statement of the Mayor and Members of the Commission Council of the City of New Orleans, filed February 16, 1953, setting forth position of City of New Orleans with regard to combined operation of New Orleans Public Service, Inc., together with letter of transmittal requesting affidavit and exhibits be received as part of record of proceedings.
65	Answer filed February 17, 1953 by Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service, Inc. to order of the Commission dated January 29, 1953.
[24] 66	Letter dated February 24, 1953 from Monroe & Lemann addressed to and received in this Commission February 26, 1953 giving opinion, in answer to request of counsel for Division of Public Utilities, as to what the requirements of mortgage are as to application of proceeds from sales of property if required by Holding Company Act.
67	Letter dated March 11, 1953 from Middle South Utilities, Inc., addressed to and received in this Commission March 12, 1953 relative to certain supplemental information concerning Louisiana Power & Light Company.
68	Report filed March 11, 1954 by Mississippi Power & Light Company in compliance with order of March 20, 1953, that it has made contract to dispose of its water system in and about the City of Crystal Springs, Mississippi, by sale of such system to Union Water Service Company.
69	Commission minute memorandum dated March 17, 1954 stating Mississippi Power & Light Company had filed notice of intent pursuant to Rule U-44(c), and that no declaration need be filed with respect to the proposed sale.

74 S. E. C. VS. LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

Document No.	Description
70	Document entitled, "Statement of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company regarding compliance with Commission's order, and application of Middle South Utilities, Inc. and Louisiana Power & Light Company for extension of time," filed March 19, 1954.
[25]	71 Document entitled, Amendment of Statement of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company, regarding compliance with Commission's order, and application of Middle South Utilities, Inc. and Louisiana Power & Light Company for extension of time," filed April 7, 1954.
72	Document entitled, "Amendment No. 2 of Statement of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company, regarding compliance with Commission's order, and application of Middle South Utilities, Inc. and Louisiana Power & Light Company for extension of time," filed April 12, 1954.
73	Certificate of notification filed April 26, 1954 by Middle South Utilities, Inc.
74	Order of this Commission dated April 28, 1954 granting extension of time within which to comply with requirements of order issued pursuant to Section 11 (b) (1) of the Public Utility Holding Company Act of 1935. (59-100 and 54-139)
75	Application or declaration on Form U-1 filed November 10, 1954 by Louisiana Power & Light Company and Louisiana Gas Service Corporation, pursuant to the Public Utility Holding Company Act of 1935 (File No. 70-3315).
76	Amendments filed November 12, 1954, December 10, 1954 and June 24, 1955 to Application or declaration on Form U-1 filed November 10, 1954 by Louisiana Power & Light Company and Louisiana Gas Service Corporation, pursuant to the Public Utility Holding Company Act of 1935.
[26]	(Note: Amendment filed November 12, 1954 is also listed as Application or declaration-File No. 31-620) Doc. No. 77.
77	Application or declaration filed November 12, 1954 by Louisiana Power & Light Company and Louisiana Gas Service Corporation, pursuant to the Public Utility Holding Company Act of 1935 (File No. 31-620).
	(Note: This is also filed as amendment to Form U-1 (70-3315) Doc. No. 76.
78	Notice of this Commission dated December 13, 1954 of filing regarding the transfer to recently organized subsidiary company of non-electric properties in consideration of cash and common stock of subsidiary company, the issuance and private sale of mortgage bonds by said subsidiary and appli-

Document
No.

Description

- cation by parent for an exemption from the Act as a temporary holding company, in the matter of Louisiana Power & Light Company and Louisiana Gas Service Corporation (File No. 70-3315), and Louisiana Power & Light Company (File No. 31-620).
- 79 Telegram dated December 22, 1954 from Louisiana Public Service Commission addressed to and received in this Commission December 23, 1954 requesting that public hearing be ordered in the matter of Louisiana Power and Light Company and Louisiana Gas Service Corporation, File No. 70-3315 and 31-620, and that record be reopened in the matter of Louisiana Power & Light Company, File Nos. 59-100 and 54-139.
- [27] 80 Application filed by Louisiana Public Service Commission on December 27, 1954 that Commission direct hearing be held in the matters bearing File Nos. 70-3315 and 31-620, that matters bearing File Nos. 59-100 and 54-139 be re-opened and that Louisiana Public Service Commission be granted opportunity to be heard.
- 80 a. Supplemental petition filed January 3, 1955 by Louisiana Public Service Commission reiterating allegations of its petition filed December 23, 1954 and adding further allegations. (File Nos. 59-100, 54-139, 70-3315 and 31-620).
- 81 Commission minute memorandum dated January 21, 1955 stating Commission determined that before ruling on petition of Louisiana Public Service Commission for hearing in the matter of Louisiana Power & Light Company et al. (File Nos. 70-3315 and 31-620) and for reopening of proceedings in the matter of Electric Power & Light Corporation, File No. 54-139 and Middle South Utilities, Inc. (File No. 59-100), Commission would desire more complete understanding of basis for petition in the form of an offer of proof with supporting brief.
- 82 Letter dated January 21, 1955 from this Commission addressed to Clayton W. Coleman, Secretary, Louisiana Public Service Commission, (cc: R. N. Salvant, Secy., Louisiana Power & Light Company, and H. F. Sanders, Secretary, Middle South Utilities, Inc.), advising that Commission will entertain offer of proof and brief if filed on or before March 1, 1955 and that Division of Corporate Regulation, Louisiana Power & Light Company and Middle South Utilities, Inc., may submit briefs on or before March 31, 1955 in support of or in opposition to petition of Louisiana Public Service Commission, and that oral argument would be heard March 28, 1955.
- [28]
- 83 Letter dated February 7, 1955 from Julius F. Hotard, clerk, City of Gretna, Louisiana, addressed to and received in this Commission February 10, 1955, enclosing resolution adopted by Mayor and Board of Aldermen on February 1, 1955, that the petition of Louisiana Public Service Commission be seriously considered by the Securities and Exchange Commission

Document
No.

Description

- 84 Letter dated February 10, 1955 from Robert F. Kennon, Governor, State of Louisiana, addressed to and received in this Commission February 14, 1955 asking that petition of Louisiana Public Service Commission seeking reconsideration of Securities and Exchange Commission orders be given favorable consideration.
- 85 Letter dated February 14, 1955 from the Louisiana Public Service Commission addressed to and received in this Commission February 16, 1955 requesting an extension of time within which to file offer of proof.
- 86 Commission minute memorandum dated February 16, 1955 directing the filing as part of record of pending proceedings in respect of Louisiana Power & Light Company, et al. (File Nos. 70-3315 and 31-620) of resolution adopted and approved on February, 1, 1955 by Board of Aldermen of the City of Gretna, Louisiana, in support of petition filed by Louisiana Public Service Commission for hearing on File Nos. 70-3315 and 31-620 and reopening of record on File Nos. 54-139 and 59-100.
- 87 Document entitled, "Resolution—A resolution requesting the Securities and Exchange Commission to permit Louisiana Power and Light Co. to obtain ownership of their gas properties" filed February 18, 1955 by Alon L. Wall, Secretary of Police Jury of Tangipahoa Parish Louisiana.
- 88 Commission minute memorandum dated February 25, 1955 stating Commission approved request of Louisiana Public Service Commission for an extension to May 2, 1955 of time for filing its offer of proof and supporting brief; briefs in support or opposition to petition of Louisiana Public Service Commission were to be filed on or before May 23, 1955, and matter was scheduled for oral argument on June 1, 1955.
- 89 Telegram dated February 25, 1955 from this Commission addressed to C. W. Coleman, Secretary, Louisiana Public Service Commission, advising that time for filing offer of proof and brief by Louisiana Public Service Commission has been extended, and that time for filing of briefs by other parties has also been extended.
- 90 Notice of appearance and petition for relief filed April 27, 1955 on behalf of the Police Jury of the Parish of Jefferson, Louisiana.
- 91 Document entitled, "Offer of proof" (with exhibits thereto) filed May 2, 1955 by Louisiana Public Service Commission.
- 92 Document entitled, "Brief on behalf of Louisiana Public Service Commission" filed May 2, 1955.
- 93 Notice of this Commission dated May 16, 1955 of filing of petition to open record in previous proceeding and to hold public hearings in respect of opened record and on pending applications and declarations, in the matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana

[29]

[30]

Document No.	Description
	Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc., Respondents (File No. 59-100), Electric Power & Light Corporation (File No. 54-139), Louisiana Power & Light Company and Louisiana Gas Corporation (File No. 70-3315), and Louisiana Power and Light Company (File No. 31-620).
94	Letter dated May 31, 1955 from Jerome M. Alper addressed to and received in this Commission June 1, 1955 requesting an extension of time to submit a statement of the position of Jefferson Parish in regard to the petition of the Louisiana Commission.
95	Commission minute memorandum dated June 9, 1955 stating Commission extended time for filing of briefs and postponed oral argument.
96	Letters dated June 9, 1955 from this Commission addressed to Monroe & Lemann, Jerome M. Alper, Reid and Priest, McDonald & Buchler, and Clayton Coleman, advising Commission has extended date for filing briefs and for oral argument.
[31] 97	Telegram dated June 23, 1955 from Louisiana Power & Light Company addressed to and received in this Commission June 24, 1955 requesting sixty day extension of time for filing statement of position and sixty day postponement of date for oral argument.
98	Telegram dated June 23, 1955 from Louisiana Public Service Commission addressed to and received in this Commission June 24, 1955 advising Louisiana Public Service Commission has no objection to granting of extension of time requested by Louisiana Power and Light Company.
99	Commission minute memorandum dated June 24, 1955 denying further extensions of time for filing statements of position and supporting briefs or postponements of the oral argument.
100	Letters dated June 27, 1955 from this Commission addressed to Clayton W. Coleman, Secy., Public Service Commission of Louisiana, Paul Canaday, Vice Pres., Middle South Utilities, Inc., Jerome Alper, and W. O. Turner, Pres., Louisiana Power & Light Company, informing that Commission was not granting any further extension of time for filing Statement of Position and supporting brief.
101	Document entitled, "Reply of Jefferson Parish to offer of proof and supporting brief" filed June 29, 1955, together with letter of transmittal containing request for waiver of 60-page rule if this document considered brief.
[32] 102	Document entitled, "Statement of position and brief in support thereof submitted by the Division of Corporate Regulation" filed June 29, 1955.
103	Document entitled, "Statement of position of Louisiana Power & Light Company" filed June 29, 1955.

Document No.	Description
104	Commission minute memorandum dated July 1, 1955 directing postponement of oral argument from July 6 to July 7, 1955, 10 A. M.; authorizing acceptance, for filing as part of record, of "Reply of Jefferson Parish to Offer of Proof and Supporting Brief" which document exceeded 60-page limitation prescribed by Rules of practice.
105	Telegrams dated July 1, 1955 from this Commission addressed to Clayton W. Coleman, Secy., Public Service Commission of Louisiana, and W. O. Turner, Pres., Louisiana Power & Light Company, advising oral argument postponed to July 7, 1955, 10 A. M.
106	Commission minute memorandum dated July 5, 1955 directing that oral argument be postponed from 10:00 a. m. to 2:30 p. m., July 7, 1955.
107	Telegrams dated July 5, 1955 from this Commission addressed to W. O. Turner, Pres., Louisiana Power & Light Company, and Clayton W. Coleman, Secy., Public Service Commission of Louisiana, advising oral argument postponed until 2:30 p. m., July 7, 1955.
108	Transcripts of oral argument held July 7, 1955.
109	Commission minute memorandum dated July 7, 1955 stating oral argument held and concluded and matter taken under advisement by Commission.

[33] III. Orders, Findings and Opinions.

- 110 Findings and opinion and order of this Commission dated March 20, 1953 under Section 11 (b) (1) requiring divestment by registered holding company of certain non-retainable properties and order releasing jurisdiction, in the matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service, Inc., Respondents (File No. 59-100), and Electric Power & Light Corporation (File No. 54-139).
- 111 Findings and opinion and order of this Commission dated September 13, 1955 denying petition to reopen prior proceedings and modify order, in the matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company and New Orleans Public Service, Inc., Respondents, File No. 59-100, Electric Power & Light Corporation, File No. 54-139, Louisiana Power & Light Company and Louisiana Gas Service Corporation, File No. 70-3315 and Louisiana Power & Light Company, File No. 31-620.

By the Commission:

ORVAL L. DuBOIS,
(Orval L. DuBois),
Secretary.

(Seal)

Date: November 8, 1955.

[34] In United States Court of Appeals for the Fifth Circuit.

ATTESTATION.—November 29, 1955.

(Title Omitted)

I hereby attest that the attached are full, true and complete copies of Documents Nos. 62, 65, 74, 79, 80, 80 a., 81, 82, 93, 110 and 111 as heretofore set forth in the "Certificate Listing and Describing Record in Proceedings before the Securities and Exchange Commission" dated November 8, 1955, as heretofore filed in this Court in the above case.

JAMES HINDLE,
(James Hindle),
Records Officer, Securities and
Exchange Commission.

35 Before the Securities and Exchange Commission

(Holding Company Act Release No. 11687)

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT
COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW
ORLEANS PUBLIC SERVICE, INC., RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

(Public Utility Holding Company Act of 1935)

Order convening hearing pursuant to Section 11 (b) (1)

January 29, 1953

On March 7, 1949, the Commission issued its Order (Holding Company Act Release No. 8906) approving, under Section 11 (e) of the Public Utility Holding Company Act of 1935 ("Act"), a plan for the dissolution of Electric Power & Light Corporation ("Electric"), a registered holding company.

Subsequent to approval by the United States District
36 Court, the plan was consummated in May and July

1949. That plan, which provided for the dissolution of Electric and the retirement of its outstanding securities through the exchange of certain other securities, also provided for the creation of a new holding company, Middle South Utilities, Inc. ("Middle South"), which acquired all of the common stocks of Arkansas Power & Light Company ("Arkansas"), Louisiana Power & Light Company ("Louisiana"), Mississippi Power & Light Company ("Mississippi") and 95.2% of the common stock of New Orleans Public Service, Inc. ("New Orleans"). Each of these companies owned electric utility assets and gas utility assets and in addition, some

of these companies owned non-utility assets. Middle South also acquired from Electric all of the securities of Gentilly Development Company ("Gentilly"), a non-utility land company.

The Commission in its Findings and Opinion upon the plan (Holding Company Act Release No. 8889) stated that it could approve the creation of Middle South as a holding company although it was not prepared at that time to make definitive findings under Section 11 of the Act with respect to the integrated nature of the electric properties or the retainability of the non-electric properties. The Commission said:

"The record indicates that the electric properties of the four operating companies are interconnected and that since 1930 they have been constructed and operated on a systemwide basis. This system has a common dispatcher and an operating committee which forecasts the loads, prepares
37 over-all schedules and gives general directions to the dispatcher.¹⁰ The construction requirements of the companies are formulated on a system rather than on an individual basis." Thus, the determination of sites and ownership of generating facilities has been on the basis of the most economical and efficient installation from the viewpoint of the system's load requirements rather than the requirements of the individual companies.

In its Order of March 7, 1949, the Commission reserved jurisdiction to institute and conduct such further proceedings under Section 11 (b) of the Act with respect to Middle South as may be necessary or appropriate.

Since the organization of Middle South, some of its subsidiary companies have disposed of various assets and Gentilly has disposed of its lands and now holds only cash. At the present time, Arkansas owns electric utility assets and steam properties; Louisiana owns electric utility assets, gas utility assets, and water properties; Mississippi owns electric utility assets and water properties; and New Orleans owns electric utility assets, gas utility assets, and transportation properties.

¹⁰ While the operating committee is composed of representatives from each of the operating companies, the nature of their functions is such as to make them representatives of the system rather than of the individual companies.

It appearing to the Commission that a further hearing should be held for the purpose of determining whether the jurisdiction heretofore reserved should be released, or
 38 whether any further action should be taken by Middle South to bring itself into conformity with the standards of Section 11 (b) (1) of the Act:

It Is Ordered pursuant to the applicable provisions of the Act and the Rules thereunder that a hearing be held on February 19, 1953 at the office of the Securities and Exchange Commission, 425 Second Street NW., Washington 25, D. C., for the purpose of determining whether the jurisdiction heretofore reserved should be released or, in the alternative, what further action should be required to be taken by Middle South and its subsidiary companies to bring them into compliance with Section 11 (b) (1) of the Act. On such day the hearing room clerk will advise as to the room in which such hearing is to be held. Any person desiring to be heard or otherwise wishing to participate in this proceeding shall file with the Commission on or before February 17, 1953, a request relative thereto as provided in Rule XVII of the Commission's Rules of Practice.

It Is Further Ordered that William W. Swift or any other officer or officers of the Commission designated by it for that purpose shall preside at such hearing. The officer or officers so designated are hereby authorized to exercise all powers granted to the Commission under Section 18 (c) of the Act and to a hearing officer under the Commission's Rules of Practice.

The Division of Public Utilities having advised the Commission that, upon the basis of its preliminary examination of the record heretofore made in the Section 11 (e) plan proceedings of Electric, that the following matters and questions are presented for consideration without prejudice
 39 to its specifying additional matters and questions upon further examination:

1. Whether the jurisdiction heretofore reserved in the order of March 7, 1949 with respect to the Middle South holding

company system under Section 11 (b) of the Act should be released.

2. Whether the Commission's prima facie determination that the electric utility assets of the Middle South holding company system constitute an integrated electric utility system as defined in Section 2 (a) (29) (A) of the Act and constitute its principal public-utility system as set forth in Section 11 (b) (1) of the Act should be made definitive and final.

3. Whether Middle South and Louisiana should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana and, if so, what terms and conditions should be imposed in connection therewith.

4. What further action should be required at this time of the respondents under Section 11 (b) (1) of the Act.

It Is Further Ordered that such respondents shall file with the Secretary of the Commission on or before February 17, 1953, their joint or several answers in the form prescribed by Rule U-25 under the Act, such answers to be directed to the issues herein set forth.

40 It Is Further Ordered that the Secretary of the Commission shall serve notice of the aforesaid hearing by mailing a copy of this notice and order by registered mail to the respondents named herein and to the Arkansas Public Service Commission, the Louisiana Public Service Commission, and the Commissioner of Public Utilities of the City of New Orleans, and that additional notice be given to all other persons by publication of this notice and order in the Federal Register and by general release of this Commission with respect to this notice and order to be distributed to the press and mailed to the mailing list for releases issued under the Public Utility Holding Company Act of 1935.

By the Commission.

ORVAL L. DuBots,
Secretary.

41 Before the Securities and Exchange Commission

[Title omitted.]

Answer

Received February 17, 1953

The respondents hereby join, as set forth below, in this Answer to the Order Convening Hearing Pursuant to Section 11 which was issued by the Securities and Exchange Commission in this proceeding on January 29, 1953 (Holding Company Act Release No. 11687).

42 The respondents respectively join in the several parts of this Answer as follows: Middle South* joins in all parts; Arkansas, in Parts I and II; Louisiana, in Parts I and III; Mississippi, in Parts I and IV; and New Orleans in Parts I and V.

I

MIDDLE SOUTH HAS AN INTEGRATED ELECTRIC SYSTEM

The electric utility properties owned and operated by Arkansas, Louisiana, Mississippi and New Orleans constitute a public utility system within the meaning of Section 2 (a) (29) (A) of the Act and also constitute the principal system of Middle South and its subsidiaries. The prima facie determination by this Commission (Matter of Electric Power & Light Corporation, Holding Company Act Release No. 8889) that said electric utility assets of the Middle South holding company system constitute an integrated electric utility system as defined in Section 2 (a) (29) (A) of the Act and constitute the principal public utility system of Middle South as set forth in Section 11 (b) (1) of the Act, should be made definitive and final.

* In this Answer Middle South Utilities, Inc. will be called "Middle South"; Arkansas Power & Light Company will be called "Arkansas"; Louisiana Power & Light Company will be called "Louisiana"; Mississippi Power & Light Company will be called "Mississippi"; and New Orleans Public Service Inc. will be called "New Orleans." The Public Utility Holding Company Act of 1935 will be called the "Act".

II

ARKANSAS

At the time of the closing of the record in the second above-entitled proceeding, Arkansas owned gas distribution properties, a transportation subsidiary and minor steam properties, as well as electric utility properties.

Arkansas applied to this Commission for permission to sell its gas distribution properties, and a sale was consummated in October, 1950 (Matter of Middle South Utilities, Inc. et al., Holding Company Act Release No. 10077).

Pursuant to an application to this Commission, the stock of the transportation subsidiary was disposed of in December, 1950 (Matter of Arkansas Power & Light Company, Holding Company Act Release No. 10300).

For a number of years Arkansas has been making efforts to dispose of the minor steam business which it conducts in Little Rock. Thus far, however, Arkansas has been unable to dispose of the steam business. Arkansas intends to continue its efforts in this direction.

III

LOUISIANA

At the time of the closing of the record in the second above-entitled proceeding, Louisiana had electric properties, gas properties and transportation properties. Louisiana
44 has since disposed of its transportation properties. In addition, in connection with the acquisition of certain electric utility assets, Louisiana acquired two minor water properties and one small ice plant. It has since disposed of one of the water properties and of the ice plant.

The remaining water property, which had to be acquired with an electric utility property, constitutes a minor operation and is believed to be de minimis.

With respect to the gas properties of Louisiana, they cannot be operated independently without the loss of substantial economies; they are all located in the single State of Louisiana; they are not so large, when combined with the Middle South system and considering the state of the art and the area affected, as to

impair the advantages of localized management, efficient operation, or the effectiveness of regulation; and they are reasonably incidental and economically necessary and appropriate to the operations of electric properties in the Middle South system.

IV

MISSISSIPPI

At the time of the closing of the record in the second above-entitled proceeding, Mississippi had electric utility properties, gas properties and water properties. Pursuant to an order on an application by Mississippi to this Commission, Mississippi disposed of its gas properties as of December 31, 1951 (Matter of Middle South Utilities, Inc., et al., Holding Company Act Release No. 11019). Mississippi has been making efforts
45 to dispose of the water properties and will continue to do so.

V

NEW ORLEANS

At the time of the closing of the record in the second above-entitled proceeding, New Orleans owned and it still owns, electric utility properties, gas utility properties and transportation properties. These properties of New Orleans are operated under a unitary franchise granted by the City of New Orleans under which the City has the right to require that the three types of service be rendered together by the holder of the franchise. The City has taken the position that it will insist upon the enforcement of its rights in this regard.

Wherefore, the respondents pray that this Commission issue an appropriate order or orders making definitive and final its preliminary finding that the electric utility properties operated by Arkansas, Louisiana, Mississippi and New Orleans constitute an integrated electric utility system as defined in Section 2 (a) (29) (A) of the Act and constitute the principal public utility system of Middle South as set forth in Section 11 (b) (1) of the Act, and releasing the jurisdiction which was reserved by this Commission in its order of March 7, 1949, approving the

plan of reorganization of Electric Power & Light Corporation
(Holding Company Act Release No. 8906).

46 Dated: February 16, 1953.

MIDDLE SOUTH UTILITIES, INC.,
By (S.) E. H. DIXON, President.

ARKANSAS POWER & LIGHT COMPANY,
By (S.) R. E. RITCHIE, President.

LOUISIANA POWER & LIGHT COMPANY,
By (S.) W. O. TURNER, President.

MISSISSIPPI POWER & LIGHT COMPANY,
By (S.) REX I. BROWN, President.

NEW ORLEANS PUBLIC SERVICE INC.,
By (S.) GEORGE S. DINWIDDIE, President.

Duly sworn to by E. H. Dixon, R. E. Ritchie, W. O. Turner,
et al.

Jurats omitted in printing. (All in italics.)

49 Before the Securities and Exchange Commission

*Order granting extension of time within which to comply with
requirements of order issued pursuant to Section 11 (b) (1)
of the Public Utility Holding Company Act of 1935*

April 28, 1954

(Holding Company Act Release No. 12475)

[Title omitted.]

50 The Commission having on January 29, 1953 insti-
tuted proceedings (File No. 59-100) pursuant to Section
11 (b) (1) of the Public Utility Holding Company Act
of 1935 ("Act"), directed to Middle South Utilities Inc.
("Middle South"), a registered holding company, and its sub-

subsidiaries, Arkansas Power & Light Company ("Arkansas"), Louisiana Power & Light Company ("Louisiana"), Mississippi Power & Light Company ("Mississippi"), and New Orleans Public Service, Inc., to determine the action necessary to be taken by Middle South (as the successor corporation to Electric Power & Light Corporation, a former registered holding company) and by Middle South's subsidiaries to comply with the requirements of Section 11 (b) (1) of the Act; and

The Commission having, on March 20, 1953, issued its Findings and Opinion and Order (Holding Company Act Release No. 11782) in which it found that the non-electric properties, consisting of the gas and water properties of Louisiana, the steam properties of Arkansas, and the water properties of Mississippi, could not be retained by Middle South and its subsidiaries under the standards of Section 11 (b) (1) of the Act, and in which it directed, pursuant to Section 11 (b) (1) of the Act, that "Middle South and its subsidiaries dispose or cause the disposition of their direct and indirect ownership in the non-electric properties owned by Arkansas, Louisiana and Mississippi in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder;" and

Middle South, Arkansas, Louisiana, and Mississippi having filed an application pursuant to Section 11 (c) of the Act requesting that the Commission issue an order extending for a period of one year from March 20, 1954, the time
51 within which the applicants shall have to comply with its Order dated March 20, 1953; and

The Commission having examined said application and the reasons advanced in support of such request, and it appearing therefrom that Middle South and its subsidiaries have been unable in the exercise of due diligence to dispose of the non-electric properties owned by Arkansas, Louisiana, and Mississippi within one year from the date of said Order, as prescribed by the provisions of Section 11 (c) of the Act, except as to certain water properties owned by Mississippi and located at Crystal Springs, Mississippi; and the Commission finding that the requested extension of time is necessary in the public interest and the interest of investors and consumers:

It Is Ordered, pursuant to Section 11 (c) of the Act, that Middle South and its subsidiaries, Arkansas, Louisiana, and Mississippi, be, and they hereby are, granted an additional period of one year from March 20, 1954, within which to comply with the said Order dated March 20, 1953 herein issued.

By the Commission.

[SEAL]

ORVAL L. DuBOIS,
Secretary.

Before the Securities and Exchange Commission

Telegram

Received December 23, 1954

RB4 81 NS A 532

'54 Dec 22 PM 8 04

NS BRA611 Long NL PD Baton Rouge La 22

Hon. ORVAL DuBOIS,

*Secretary, Securities and Exchange Commission,
Wash., D. C.*

52 This Commission respectfully requests that Public Hearing be ordered in the matter of Louisiana Power and Light Company and Louisiana Gas Service Corporation your file number seventy dash three three one five and thirty one dash six twenty. Also respectfully request that your file number fifty nine dash one hundred and fifty four dash one three nine Louisiana Power & Light Company be reopened and set for further hearing at the same time for purpose of receiving additional evidence primarily with respect to the increased cost burden which would be imposed upon the operation of the natural gas properties of Louisiana Power and Light Company if such gas properties are required to be operated separately from the electric properties. Written application for such reopening being forwarded by air mail.

LOUISIANA PUBLIC SERVICE COMMISSION.

53 Before the Securities and Exchange Commission

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC.,
ARKANSAS POWER & LIGHT COMPANY, LOUISIANA POWER &
LIGHT COMPANY, MISSISSIPPI POWER & LIGHT COMPANY,
NEW ORLEANS PUBLIC SERVICE INC., RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY,
LOUISIANA GAS SERVICE CORPORATION

(File No. 70-3315)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF LOUISIANA POWER & LIGHT COMPANY

(File No. 31-620)

(Public Utility Holding Company Act of 1935)

*Application by Louisiana Public Service Commission that
hearing be held, etc.*

December 23, 1954

54 The petition of Louisiana Public Service Commission,
a regulatory administrative tribunal created and
existing by virtue of the Constitution and laws of the
State of Louisiana, respectfully shows:

1. In the above entitled proceedings bearing file numbers
59-100 and 54-139, findings and opinion were issued by this
Honorable Commission, after hearings, concluding that Louisi-
ana Power & Light Company, a respondent in such proceedings,
had failed to establish that separation of the Louisiana gas
properties owned by it would result in the loss of substantial
economies such as would justify the retention of its gas prop-

erties together with its electric properties and an order was issued in accordance with the said opinion and findings.

2. That the said respondent, Louisiana Power & Light Company, is a utility under the jurisdiction of the Louisiana Public Service Commission, which Commission did not participate in the said proceedings, and that the Louisiana Public Service Commission is charged by law with the duty of regulating the said utility in the public interest.

3. That the petitioner believes and alleges that the hearings had in the above matters, particularly the matter bearing File No. 59-100, did not elicit the existing facts and information which would have demonstrated that the indicated divestiture of gas properties by Louisiana Power & Light Company is not in the public interest; that the retention of these gas properties by Louisiana Power & Light Company would bring about substantial economies of such a nature as to justify the retention of such properties; that the separation of such properties would lead to increased cost of gas to the consumers of
55 gas in the State of Louisiana and should not be consummated; and that an opportunity should be afforded petitioner by the reopening of these matters and the record therein for the reception of further evidence on the questions therein involved and relating to Louisiana Power & Light Company.

4. That in order to afford such an opportunity it is necessary that the above-entitled matters bearing File Numbers 70-3315 and 31-620 be set down for hearing; and petitioner believes and respectfully suggests that the matters bearing File Numbers 59-100, 54-139, 70-3315 and 31-620 should be consolidated for the purposes of hearing and consideration by this Honorable Commission.

Wherefore, the Louisiana Public Service Commission respectfully prays that this Honorable Commission direct that a hearing be held in the matters bearing File Numbers 70-3315 and 31-620, and that the matters bearing File Numbers 59-100 and 54-139 be reopened; and that the Louisiana Public Service Commission be granted an opportunity to be heard in connection therewith and to offer evidence therein. The Louisiana Public Service Commission further prays for such other and

further relief as may be found by this Honorable Commission to be appropriate in the premises.

LOUISIANA PUBLIC SERVICE
COMMISSION,
By CLAYTON W. COLEMAN,
Secretary.

56 By Order of the Commission: Baton Rouge, Louisiana, December 23, 1954.

Received Dec. 27, 1954.

Duly sworn to by Clayton W. Coleman.

Jurat omitted in printing. (All in italics.)

57 Before the Securities and Exchange Commission

[Title omitted.]

Supplemental petition

Received Jan. 3, 1955

The supplemental petition of Louisiana Public Service Commission, a regulatory administrative tribunal
58 created and existing by virtue of the Constitution and laws of the State of Louisiana, respectfully shows:

1. That it reiterates and reavers the allegations of its original petition filed herein on December 23, 1954, and further alleges and states as follows:

2. That the Louisiana Power & Light Company, respondent, has consented to the reopening of the proceedings in File Nos. 59-100 and 54-139 insofar as concerns the said respondent, and the evidence of such consent is hereto annexed and made part hereof as Exhibit A.

3. That since the final hearings had in File Nos. 59-100 and 54-139 and the subsequent issuance of order herein, there have occurred substantial and important changes in the conditions and facts upon which the findings and order of this Honorable Commission were predicated in said proceedings, of such a character as, in petitioner's opinion, would have led this Honorable Commission to reach a different and contrary conclu-

sion in these proceedings with regard to the divestiture by Louisiana Power & Light Company of its gas properties, and petitioner respectfully suggests that in the public interest evidence of such changes should be resolved and considered.

Wherefore, the Louisiana Public Service Commission respectfully prays that this Honorable Commission direct that a hearing be held in the matters bearing File Numbers 70-3315 and 31-620, and that the matters bearing File Numbers 59-100 and 54-139 be reopened; and that the Louisiana Public Service Commission be granted an opportunity to be
59 heard in connection therewith and to offer evidence therein. The Louisiana Public Service Commission further prays for such other and further relief as may be found by this Honorable Commission to be appropriate in the premises.

By Order of the Commission: Baton Rouge, Louisiana,
December 31, 1954.

LOUISIANA PUBLIC SERVICE
COMMISSION,
By C. W. COLEMAN,

Secretary.

Duly sworn to by Clayton W. Coleman.

Jurat omitted in printing. (All in italics.)

60

Exhibit A to supplemental petition

Received Jan. 3, 1955

The Louisiana Power & Light Company

142 Delaronde Street

New Orleans 14, Louisiana

DECEMBER 31, 1954.

SECURITIES & EXCHANGE COMMISSION,

Washington, D. C.

GENTLEMEN: We have been advised that Louisiana Public Service Commission has petitioned the Commission to reopen the proceedings in Files 59-100 and 54-139 insofar as the disposition by this company of its gas properties is concerned and has requested our consent to such reopening. This will

94 S. E. C. VS. LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

advise you that this company has no objection to such reopening of such proceedings and this will evidence our consent to such action by you.

Your very truly.

(Signed) W. O. Turner,
W. O. TURNER,
President.

WOT:lr

61 (Copy of original which has been mailed directly to
Securities and Exchange Commission, Washington,
D. C.)

Before the Securities and Exchange Commission

Memorandum to Docket Section

January 21, 1955

RE: LOUISIANA POWER & LIGHT COMPANY, ET AL. (FILES 70-3315 AND 31-620), ELECTRIC P*WER & LIGHT CORPORATION (FILE 54-139), MIDDLE SOUTH UTILITIES, INC. (FILE 59-100)

The Louisiana Public Service Commission having filed a petition for a hearing in the proceedings under the Public Utility Holding Company Act of 1935 pending in respect of Louisiana Power & Light Company, et al. (Files 70-3315 and 31-620), and for a reopening of the record in the proceedings in the matter of Electric Power & Light Corporation (File 54-139) and Middle South Utilities, Inc. (File 59-100); and the Commission having given due consideration to the matter; the Commission determined that, before ruling on the petition to reopen the record, it should have a more complete understanding of the basis for the petition in the form of an offer of proof with a supporting brief.

Accordingly, the Commission approved a letter to Mr. Clayton W. Coleman, Secretary of the Louisiana Public Service Commission, calling for the filing of such offer and brief on or prior to March 1, 1955. The letter to Mr. Coleman further suggested that a copy of any such offer of proof and supporting brief be supplied to Louisiana Power & Light Company

62 and Middle South Utilities, Inc., and the letter fixed March 21, 1955, as the date on which briefs in support of or in opposition to the petition might be filed by the Division of Corporate Regulation, Louisiana Power, and Middle South. Oral argument was to be heard on March 28, 1955, at 10:00 A. M.

ORVAL L. DuBois,
(O. D.),

Secretary.

Before the Securities and Exchange Commission

JANUARY 21, 1955.

OFFICE OF THE SECRETARY,

MR. CLAYTON W. COLEMAN, *Secretary,*
Louisiana Public Service Commission,
Baton Rouge 4, Louisiana.

RE: LOUISIANA POWER & LIGHT CO., ET AL., FILE NOS. 70-3315,
31-620, 59-100, 54-139

DEAR Mr. CLAYTON: After giving preliminary consideration to your petition for a reopening of the record and reconsideration by the Securities and Exchange Commission of its 1953 order of divestment directed against Louisiana Power & Light, the Commission decided that before making a final determination of whether to order the record reopened, it should have a more complete understanding of the basis for your petition in the form of an offer of proof with a supporting brief. Accordingly, I have been directed to advise you that the Commission will entertain such an offer of proof and brief if filed on
63 or prior to March 1, 1955. The offer should set out in reasonable detail the facts which you would seek to prove to establish changed circumstances supporting a modification of the order and any other facts which you deem relevant and will seek to establish. In the brief you can submit your arguments for reopening the record. You should supply a copy of any such offer of proof and supporting brief to Louisiana Power & Light Company and Middle South Utilities, Inc. On or before March 21, 1955, the Division of Corporate Reg-

ulation, the Louisiana Power & Light Company, and Middle South Utilities, Inc. may submit briefs in support of or in opposition to the petition. Oral argument will be heard at 10:00 o'clock A. M. on March 28, 1955.

Copies of this letter are being sent to the Louisiana Power & Light Company and Middle South Utilities, Inc.

Very truly yours,

ORVAL L. DuBOIS,
Secretary.

RN Hislop
RAMcDowell/ms
1/20/55

cc: R. N. Salvant, Secretary
Louisiana Power & Light Company,
142 Delaronde Street,
New Orleans 14, Louisiana

H. F. Sanders, Secretary,
Middle South Utilities, Inc.,
Two Rector Street,
New York 6, New York.

64 Before the Securities and Exchange Commission

Notice of filing of petition to open record in previous proceeding and to hold public hearings in respect of opened record and on pending applications and declarations

May 16, 1955

(Holding Company Act Release No. 12892)

[Title omitted.]

65 Notice Is Hereby Given that Louisiana Public Service Commission ("Public Service Commission") has filed a petition, supplemental petition, offer of proof, and brief requesting this Commission to open the record in the consolidated proceeding "In the Matter of Middle South Utilities, Inc., et al., File No. 59-100" and "In the Matter of Electric Power &

Light Corporation, File No. 54-139" and to hold a public hearing thereon and also in respect of pending applications-declarations of Louisiana Power & Light Company ("Louisiana Power"), a public utility subsidiary of Middle South Utilities, Inc. ("Middle South"), a registered holding company, and a pending application-declaration of Louisiana Gas Service Corporation ("Louisiana Gas"), a subsidiary of Louisiana Power, these applications-declarations having been filed with this Commission on November 10, 1954 and having been described in a Notice of Filing heretofore issued by the Commission on December 13, 1954 (Holding Company Act Release No. 12740).

66

I

BACKGROUND

On January 29, 1953, this Commission issued a Notice and Order directed, inter alia, to Middle South and Louisiana Power, concerned with a public hearing, pursuant to Section 11 (b) (1) and Section 11 (e) of the Act (File Nos. 59-100 and 54-139). Among the issues enumerated in that Notice and Order as being the subject matter of the hearing was the following:

"Whether Middle South and Louisiana [Power] should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana [Power] and, if so, what terms and condition should be imposed in connection therewith."

A copy of this Notice of and Order for hearing was served on Public Service Commission by registered mail.

The Order convening the hearing directed Respondents to answer the allegations set forth in the Notice and Order. In their answer, Middle South and Louisiana Power claimed that the gas properties of Louisiana were retainable as a public-utility system additional to the integrated electric utility system of Middle South. Neither the Public Service Commission nor the representative of any other public body or of public security holders appeared at the public hearing with respect to the retainability of the gas properties of Louisiana Power. Briefs and oral argument before this Commission were waived by all parties.

67 On March 20, 1953 this Commission issued its Findings and Opinion and Order in which it was concluded, among other things, that Louisiana Power and Middle South should divest themselves of all non-electric properties. The Commission stated:

"The general framework of the Act as well as its legislative history demonstrates the intention of permitting the retention of additional systems only where such additional system is so small that it could not operate economically under separate management. (Citing Cong. Report on S. 2796, H. R. No. 1903, 74th Cong., 1st Sess. p. 71; 79 Cong. Rec. 14479 (Aug. 24, 1935) and *The North American Company v. S. E. C.*, 327 U.S. 686, 696-697 (1946).) It is clear that the gas properties of Louisiana (Power) are capable of effective and economical operation as a separate entity, and are, in fact, larger than many completely independent systems. We note in this connection that two of Louisiana (Power's) sister companies, Arkansas and Mississippi, have disposed of their gas properties which are now independently operated.

"We have previously pointed out that the separation of electric and gas utility systems from common control frequently results in some increase in operating expenses due to the elimination of certain types of savings which common control has permitted. (Citing *Engineers Public Service Company*, 12 S. E. C. 41 (1942); *The Philadelphia Company, Holding Company Act Release No. 8242* (June 1, 1948); *The North American Company*, 11 S. E. C. 194 (1946).) However, the statutory criterion for retention stated in Section 11 (b) (1)

68 (A) of the Act is not whether there is some additional expense. For the loss of economies to be 'substantial' they must be 'important' in the sense that they are of such magnitude as to cause a serious economic impairment of the system. (Citing *General Public Utilities Corporation, Holding Company Act Release No. 10982*.) There is no evidence in this case to warrant the conclusion that separation of the gas and electric properties of Louisiana (Power) would cause the serious economic impairment of the gas system or that the gas properties could not operate effectively and efficiently under separate ownership."

The order directed " * * * Middle South and its subsidiary (to) dispose or cause the disposition of their direct or indirect ownership in the non-electric properties owned by * * * Louisiana (Power) * * * in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder; * * *" (Holding Company Act Release No. 11782.)

Thereafter, pursuant to an application of Louisiana Power, the Commission extended until March 20, 1955 the period of time by which Middle South and Louisiana Power were required to dispose of their interests in the non-electric properties of Louisiana Power.

As hereinbefore stated, on November 10, 1954 Louisiana Power and Louisiana Gas filed a joint application-declaration with this Commission proposing the divestment by Louisiana Power to Louisiana Gas of all the non-electric properties of Louisiana Power and the issuance of common stock and debt securities by Louisiana Gas. In this filing, Louisiana

69 Power also sought an order of this Commission declaring, pursuant to Section 3 (a) (4) of the Act, that Louisiana Power was only temporarily a holding company, the filing indicating that while no definitive program had at that time been developed in respect of the divestment of the common stock of Louisiana Gas by Louisiana Power it was its intention to effect the divestment within a period of 18 months from the date of acquisition.

This Commission on December 13, 1954 issued its Notice of Filing in respect of this joint application-declaration and notified any interested person that, no later than December 27, 1954, he could request the Commission in writing that a hearing be held on such matter stating the reasons for such request, the nature of his interest and the issues of fact or law raised by the joint filing which he desires to controvert. By telegram dated December 22, 1954 Public Service Commission requested a public hearing in this matter and, in addition thereto, asked that the Commission open the record in the prior proceedings which had resulted in the divestment order of March 20, 1953. Thereafter Public Service Commission filed a petition and supplemental petition containing, among other things, a consent

on the part of Louisiana Power to a reopening of the record in the prior proceedings.

II

POSITION OF LOUISIANA PUBLIC SERVICE COMMISSION

Generally speaking, Public Service Commission states that all of the physical properties of Louisiana Power, both
70 gas and electric, are located in the State of Louisiana.

Public Service Commission further states that it is empowered to regulate and control public-utility companies, including the transfer of the ownership of the assets of such companies (a power asserted by General Order of that Commission adopted and published June 16, 1953), that "Louisiana State policy favors the retention of gas distribution systems by electric utilities," that fourteen of the fifteen Parishes of the State of Louisiana served by Louisiana Power and all of the thirty-one communities served have officially expressed themselves as favoring the retention of the gas properties by Louisiana Power, and that both the gas and electric consumers of Louisiana Power will best be served by the continued operation of both the gas and electric properties by Louisiana Power.

III

DESCRIPTION OF MATERIAL FILED BY LOUISIANA PUBLIC SERVICE COMMISSION IN SUPPORT OF ITS POSITION

All interested persons are referred to the petition, supplemental petition, offer of proof, exhibits attached thereto, and brief of Public Service Commission, which are on file in the office of this Commission. The pertinent portions of these documents may be summarized as follows:

The offer of proof outlines six general matters which Public Service Commission would propose to establish at a public hearing in these proceedings. These six items are concerned primarily with the following considerations: (i) on the basis of a
71 separation study of Louisiana Power for the year 1954 prepared by the members of the staff of Public Service Commission which allegedly " . . . shows that the total additional cost of such separation to Louisiana (Power's) utility

customers would be \$957,000 of which \$684,337 would be additional cost to Louisiana (Power's) electric customers, (and) \$272,816 would represent additional cost to the non electric customers," the gas system of Louisiana Power cannot be operated as an independent system without the loss of substantial economies; (ii) the electric and gas systems of Louisiana Power are located entirely within the State of Louisiana; (iii) the continued combination of such systems will not impair the advantages of localized management, efficient operation or the effectiveness of regulation; (iv) no law of the State of Louisiana prohibits the joint ownership or operation of gas and electric utility assets; (v) the public interest and the interest of consumers will best be served by the continued joint operation by Louisiana Power of gas and electric utility assets, and (vi) it is the desire of all governmental agencies of the territory served by Louisiana Power (except Jefferson Parish) that the joint operation of these properties by Louisiana Power be continued.

The brief of Public Service Commission submitted in support of the offer of proof outlines five general propositions as follows: (a) Public Service Commission proposes to present facts and arguments not considered by this Commission at the hearing which resulted in its order dated March 20, 1953. These facts and arguments, generally speaking, are concerned with the separation study prepared by the staff of Public Service Commission in respect of the loss of economies hereinbefore referred to; information in respect of the difference in

72 interest rates between mortgage bonds sold by Louisiana Power on October 19, 1954 resulting in a net cost of money of 3.11% per annum and the proposed debt securities of Louisiana Gas with a cost of money of 3.55% per annum; a comparison of the seasonal variations in the sales of gas and electric energy purporting to demonstrate that these variations tend to complement each other; a comparison of the operations of Louisiana Power with Arkansas Power & Light Company and Mississippi Power & Light Company, two affiliated companies of Louisiana Power, which pursuant to orders of this Commission have divested themselves of their gas properties,

purporting to show an increase in operating expenses per customer for Arkansas Power & Light Company and Mississippi Power & Light Company in 1954 as compared with 1949 exceeding the increase during this same period for Louisiana Power; (b) that the foregoing additional evidence establishes that the requirements of Section 11 (b) (1) of the Act would permit the retention by Louisiana Power of its non-electric properties; (c) that the legislative history of the Act demonstrates that State policy primarily determines whether gas and electric properties should be retained in a general operating company; (d) that the public interest will best be served by the retention of the gas properties by Louisiana Power; and (e) that from an "over all" point of view it would appear that the Act has accomplished its purpose with respect to this utility and that further "disintegration" would only prove harmful.

IV

73 Notice Is Further Given that Middle South and Louisiana Power and any other interested person may file a statement in support of or in opposition to the position of Public Service Commission setting forth in such statement the nature of his interest therein, the allegations in the petition of Public Service Commission which he controverts and the reasons and conclusions in support of his position. This Statement of Position with supporting arguments should be submitted on or before June 13, 1955 at 5:30 P. M., E. D. S. T. and should be addressed: Secretary, Securities and Exchange Commission, Washington 25, D. C.. Thereafter, on June 20, 1955 at 10:30 A. M., E. D. S. T. the Commission will hear oral argument thereon.

By the Commission.

[SEAL]

ORVAL L. DuBOIS,
Secretary.

74 Before the Securities and Exchange Commission

(Holding Company Act Release No. 11782)

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT
COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW
ORLEANS PUBLIC SERVICE, INC. RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

(Public Utility Holding Company Act of 1935)

Findings and Opinion

March 20, 1953

Integration of Holding Company System

Retainability of Integrated Electric System

Where electric utility assets controlled by a registered holding company are shown to be interconnected and economically operated, and where in other respects such assets meet the definition of a public utility system contained in Section 2

75 (a) (29) (A) of the Act, and where Commission has previously made prima facie determination of integration, held that retention of such properties as the principal utility system is appropriate under Section 11 (b) (1).

Non-Retainability of Additional System

Where subsidiary of registered holding company conducts both electric and gas operations and electric operations are held to be part of integrated electric utility system, held that gas properties are not retainable as additional system, the Commission finding that evidence is not sufficient to justify finding that "loss of substantial economies" would be incurred if retention of gas system were not permitted.

Non-Retainability of Other Businesses

Minor steam and water operations of subsidiary of registered holding companies held not to be retainable as reasonably incidental or economically necessary or appropriate to operation of principal electric utility system.

Appearances:

Daniel James and Robert Krones, of Cahill, Gordon, Zachary & Reindel, New York, New York, for Middle South Utilities, Inc.

L. J. Darrah, of Jones, Walker & Waechter, New Orleans, Louisiana, for New Orleans Public Service, Inc.

J. Raburn Monroe, of Monroe & Lemann, New Orleans, Louisiana, for Louisiana Power & Light Company.

Marvin S. Fink, for the Division of Public Utilities of the Securities and Exchange Commission.

76 These proceedings concern the status of Middle South Utilities, Inc. ("Middle South"), a registered holding company, and its subsidiaries under the provisions of Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 ("Act").

On March 7, 1949, the Commission issued its Order under Section 11 (e) of the Act approving a plan for the dissolution of Electric Power & Light Corporation ("Electric"), a registered holding company,¹ on the basis of the Commission's Findings and Opinion of March 1, 1949.² Subsequent to court approval,³ the plan was consummated in May and July 1949. That plan, which provided for the dissolution of Electric and retirement of its outstanding securities through the exchange of portfolio securities, also provided for the creation of a new holding company, Middle South, which acquired from Electric the latter's holdings of the common stocks of Arkansas Power

¹ Electric Power & Light Corporation, Holding Company Act Release No. 8906 (March 7, 1949).

² Electric Power & Light Corporation, Holding Company Act Release No. 8889 (March 1, 1949).

³ In Re Electric Power & Light Corporation (unreported) Civ. Action No. 49-347 (S. D. N. Y., April 22, 1949), aff'd 176 F. 2d 687 (C. A. 2, 1949) stay denied 337 U. S. 903 (1949).

& Light Company ("Arkansas") (100%), Louisiana Power & Light Company ("Louisiana") (100), Mississippi Power & Light Company ("Mississippi") (100%), and New Orleans Public Service, Inc. ("New Orleans") (95.2%). Each of these companies at that time owned and operated electric utility properties and gas utility properties, and in addition, certain of the companies owned and operated non-utility properties. Middle South also acquired from Electric all of the securities of Gentilly Development Company ("Gentilly"), a non-utility land company.

Since Middle South's organization, Arkansas has disposed of its transportation and gas properties,⁴ and Mississippi has disposed of its gas properties.⁵ At the present time, Arkansas and Mississippi are engaged almost entirely in electric operations. Louisiana conducts electric and gas properties,⁶ and New Orleans is engaged in electric, gas and transportation operations. In addition, certain of the subsidiaries have minor steam and water facilities. Gentilly has disposed of its land and now has only cash.

In our Findings and Opinion on the Electric plan, we stated that we could approve the creation of Middle South as a holding company although we were not prepared at that time to make the definitive findings required under Section 11 of the Act with respect to the integrated nature of the electric properties or the retainability of the non-electric properties. Accordingly, in our Order of March 7, 1949 approving the Electric plan, we reserved jurisdiction to institute and conduct such further proceedings under Section 11 (b) of the Act with respect to Middle South as may be necessary or appropriate.

78 On January 29, 1953, we issued an Order, convening hearings pursuant to Section 11 (b) (1), directed to Middle South, Arkansas, Louisiana, Mississippi and New Orleans as Respondents, setting forth the following issues:

⁴ Arkansas Power & Light Company, Holding Company Act Release No. 10077 (September 6, 1950) (Gas properties); Arkansas Power & Light Company, Holding Company Act Release No. 10310 (Transportation properties).

⁵ Mississippi Power & Light Company, Holding Company Act Release No. 11019 (January 22, 1952).

⁶ Louisiana disposed of its transportation properties on March 1, 1949.

"1. Whether the jurisdiction heretofore reserved in order of March 7, 1949 with respect to the Middle South holding company system under Section 11 (b) of the Act should be released.

"2. Whether the Commission's prima facie determination that the electric utility assets of the Middle South holding company system constitute an integrated electric utility system as defined in Section 2 (a) (29) (A) of the Act and constitute its principal public-utility system as set forth in Section 11 (b) (1) of the Act should be made definitive and final.

"3. Whether Middle South and Louisiana should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana and, if so, what terms and conditions should be imposed in connection therewith.

"4. What further action should be required at this time of the respondents under Section 11 (b) (1) of the Act."

In their answer filed pursuant to direction of the Commission in the order convening the hearing, Respondents claimed that the electric properties of the four public utility companies constituted an integrated electric utility system and were retainable as Middle South's principal system; Middle South and Louisiana claimed that the gas properties of Louisiana could be retained as an additional system; and Middle South and New Orleans stated that the gas properties and transportation properties of New Orleans together with the electric properties of that Company are operated under a unitary franchise under which the City of New Orleans has the right to require that all three services be rendered by the holder of the franchise. At the public hearing, a representative of the City of New Orleans testified in support of the City's position as set forth in the answer of Middle South and New Orleans, and to the further effect that the City was opposed to segmentation of the gas, electric and transportation properties of New Orleans. No other representatives of public bodies or security holders' interests appeared at the hearing. Respondents waived briefs and argument. On the basis of the record, we make the following findings:

Applicable Statutory Standards

The statutory standards which are applicable to a determination of the status of the Middle South system are to be found in Section 11 (b) (1) and 2 (A) (29) of the Act. Section 11 (b) (1) provides:

"(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

"(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such
80 other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

"The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or of the protection

of investors or consumers and not detrimental to the proper functioning of such system or systems."

81 The term "integrated public utility system" is defined in Section 2 (A) (29) with respect to utility companies, as follows:

"(29) 'Integrated public-utility system' means—

"(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single inter-connected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

"(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: Provided, That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region."

82 In considering the application of these standards to determine the status of Middle South and its subsidiaries, we shall discuss first the operations of Middle South, then the gas properties of Louisiana sought to be retained and thereafter the New Orleans situation.

Description of Middle South

A. General:

Attached hereto as Appendix A is a consolidating balance sheet of Middle South as of December 31, 1952. Attached

hereto as Appendix B is a consolidating income statement of Middle South for the twelve months ended December 31, 1952.

Middle South is purely a holding company whose principal assets consist of its holdings of the common stock of its subsidiaries, Arkansas, Louisiana, Mississippi and New Orleans.⁷ The subsidiaries of Middle South operate an interconnected electric system in the States of Arkansas, Louisiana and Mississippi. Two of the subsidiaries, Louisiana and New Orleans, also conduct gas operations, and New Orleans operates
83 a street transportation system in the City of New Orleans. In addition, certain of the subsidiaries also operate minor water and steam properties.

At December 31, 1952, the subsidiaries furnished electric service to 732,308 customers, and gas service to 202,512 customers in an area having an aggregate population of approximately 4,000,000. The more important cities served with electricity by the system are Little Rock, Pine Bluff, El Dorado, Camden and Hot Springs, Arkansas; New Orleans, Gretna and Metairie, Louisiana; and Jackson, Greenville, Natchez, Greenwood and Clarksdale, Mississippi. The principal cities served with gas are New Orleans, Gretna and Metairie, Louisiana.

At December 31, 1952, the total consolidated plant account was stated at \$465,970,699, of which \$419,905,711 was electric plant, including \$12,255,874 classified as electric plant acquisition adjustments; \$29,639,542 was gas plant, including \$351,134 classified as gas plant acquisition adjustments; \$15,968,812 was transportation plant, and \$456,637 represented miscellaneous properties. Applicable reserves for depreciation or retirement and amortization of plant acquisition adjustments aggregated \$76,938,882. Set forth below as Table I is a summary

⁷ Middle South is one of five "sponsoring companies" of Electric Energy, Inc., and holds 10% of the \$3,500,000 outstanding common stock of that company. In authorizing acquisition of the stock of Electric Energy, Inc. by the sponsoring companies, we reserved the right in the future to determine whether any one or more of the sponsoring companies may retain the ownership of the stock of Electric Energy, Inc. That reservation is unaffected by these proceedings.

110 S. E. C. VS. LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

of the plant account and reserves of each of the operating companies as of December 31, 1952.

84

TABLE I

	Arkansas Power & Light Co.	Louisiana Power & Light Co.	Mississippi Power & Light Co.	New Orleans Public Serv- ice Inc.
Plant, Property and Equipment:				
Electric Utility Plant	\$151, 275, 361	\$82, 053, 990	\$73, 933, 582	\$74, 289, 885
Natural Gas Utility Plant		7, 645, 715		21, 174, 004
Transportation Plant				15, 968, 812
Construction Work in Progress	15, 169, 189	5, 479, 694	5, 956, 210	
Other		190, 499	226, 750	
Plant Acquisition Adjustments:				
Electric	4, 990, 986	3, 782, 140	3, 482, 748	
Natural Gas		351, 134		
Total Plant, Property and Equipment	171, 435, 436	99, 503, 172	83, 599, 290	111, 432, 701
Less Reserves for:				
Property Depreciation or Retirement	17, 348, 276	16, 944, 016	9, 849, 404	26, 393, 203
Amortization of Utility Plant Acquisition Adjustments	1, 618, 710	2, 688, 868	2, 096, 405	
Total	18, 966, 986	19, 632, 884	11, 945, 809	26, 393, 203
Plant, Property and Equipment, less reserves	152, 468, 550	79, 870, 288	71, 653, 481	85, 039, 498

85 For the twelve months ended December 31, 1952, the total consolidated operating revenues of the system amounted to \$116,055,327, of which \$94,927,405 were electric revenues, \$12,086,069 were gas revenues, \$8,954,765 were transportation revenues and \$87,088 were from miscellaneous sources. The system operating income was \$22,979,947, and gross income and net income after payment of the subsidiaries' preferred dividends, amounted to \$23,370,541, and \$13,511,243 respectively. Table II below sets forth a summary income account for each subsidiary company for the twelve months ended December 31, 1952.

TABLE II

	Arkansas	Louisiana	Mississippi	New Orleans
Operating Revenues:				
Electric.....	\$36,393,281	\$20,112,351	\$22,430,853	\$22,178,181
Natural Gas.....		3,977,364		8,181
Transportation.....				8,181
Other.....		25,366	61,722	
Total Operating Revenues.....	36,393,281	24,115,081	22,492,575	39,185,905
Operating Revenue Deductions.....	27,048,340	19,888,868	17,704,842	34,191,761
Net Operating Revenues.....	9,344,941	4,226,213	4,787,733	4,994,144
Rent for lease of plant.....	373,084			
Operating Income.....	8,971,857	4,226,213	4,787,733	4,994,144
Other Income (Net).....	154,222	4,593	78,654	146,732
Gross Income.....	9,126,079	4,230,806	4,866,387	5,140,876
Interest and other Charges to Gross Income.....	2,855,128	1,091,632	1,274,621	1,631,829
Net Income.....	6,270,951	3,139,174	3,591,766	3,509,047
Preferred Dividends.....	608,609	356,532	266,856	369,541
Balance.....	5,662,342	2,782,642	3,324,910	3,139,506

87. *B. Electric Utility System:*

Having described the plant, revenues, and territory served by the operating subsidiaries of Middle South, we turn now to a discussion of the system from the viewpoint of its electric operations to determine whether it constitutes an integrated electric utility system as defined in Section 2 (a) (29) (A).

Sales of electric energy of the system, after elimination of intercompany transactions, aggregated 6,640,253 MKWH, resulting in consolidated electric operating revenues of \$94,927,000. Table III sets forth the sales of energy of each company for the year 1952, and the revenues received therefrom.

TABLE III

	Arkansas	Louisiana	Mississippi	New Orleans
<i>Electric Energy Sales (MKWH)</i>				
Residential and Rural.....	330, 573	197, 704	173, 648	245, 176
Commercial.....	272, 581	114, 118	176, 520	306, 176
Industrial.....	1, 832, 701	570, 176	431, 598	297, 331
Government and Municipal.....	58, 385	58, 913	42, 690	87, 528
Total General Business.....	2, 494, 240	940, 911	824, 456	936, 673
Public Utilities:				
System Companies.....	441, 514	693, 362	189, 615	356, 781
Non-System Companies.....	470, 694	127, 990	845, 289	-----
Total Electric Energy Sales.....	3, 406, 448	1, 762, 263	1, 859, 360	1, 293, 454
<i>Electric Operating Revenues (000's Omitted)</i>				
Residential and Rural.....	11, 893	6, 648	6, 068	7, 511
Commercial.....	7, 310	4, 047	5, 540	8, 098
Industrial.....	11, 455	5, 613	5, 265	3, 564
Government and Municipal.....	718	728	642	1, 127
Total General Business.....	31, 376	17, 036	17, 515	20, 300
Public Utilities:				
System Companies.....	2, 253	1, 968	342	1, 567
Non-System Companies.....	2, 599	909	4, 471	-----
Total from Energy Sales.....	36, 228	19, 913	22, 328	21, 867
Miscellaneous Revenues.....	165	199	103	255
Total Electric Operating Revenues.....	36, 393	20, 112	22, 431	422, 122

89 The total net generating capacity of the system at the end of 1952 was 1,275,905 KW. Of this amount 839,250 KW represents capacity installed in the years 1943-1952, inclusive. In addition, there is under construction and on order additional generation equipment having an estimated net capability of 907,000 KW to be installed in the years 1953-1955. The record indicates that the construction programs of the Middle South system are coordinated through an operating committee. This committee meets regularly and reviews and estimates the system loads for a period several years in advance. Estimates are also made of the required system generating capabilities and of the individual companies. On the basis of these estimates, the operating committee makes its recommendations to the individual companies' managements at to the installation of additional generating facilities and construction of transmission lines. The record indicates that this system planning has made possible the installation of larger generating units than would be feasible if each of the companies were operated as individual entities, and has also

resulted in lower unit costs for the power produced as well as lower initial installation costs.

The properties of the four operating subsidiaries are interconnected through a transmission grid covering the entire system and consisting for the most part of lines operated at 110 KV and higher. At December 31, 1952 the system had 4,828 miles of lines operated at 33 KV or over, of which 3,910 miles were 110 KV or over.

90 The operating committee also establishes general procedures for system operation under which the system operator at Pine Bluff, Arkansas, determines the methods of operation, and provides for scheduling of generation, over all system dispatching, and all other interrelated operations involved in the coordination of generation and transmission. The system operator at Pine Bluff coordinates the operations of the various companies of the system, provides for the scheduling of generation, the dispatching of energy over transmission lines, and the making and keeping of records and necessary reports. He also supervises load control, interchange and metering of energy, and the relaying facilities necessary for system operation.

In addition to the main system dispatcher at Pine Bluff, dispatching offices are also maintained at the Market Street Generating Station in New Orleans, and at the Rex Brown Generating Station at Jackson, Mississippi. The New Orleans dispatching office controls the generation and switching in the City of New Orleans and also supervises the switching of the Louisiana transmission system in Southern Louisiana. In supervising the switching of the Louisiana transmission system, certain functions are cleared with the Pine Bluff office prior to execution, while certain other functions are handled directly by the New Orleans dispatcher.

The record shows that there are substantial transfers of power among Arkansas, Louisiana and Mississippi. New Orleans supplies all of its own power and a substantial part of the requirements of Louisiana for the latter's operations in Southern Louisiana. Table IV below shows the sales of power among the system companies for the calendar year 1952.

TABLE IV

Sales by—	Arkansas		Sales to—			
			Louisiana		Mississippi	
	MKWH	Revenues	MKWH	Revenues	MKWH	Revenues
Arkansas.....		\$	3, 107	\$67, 000	438, 407	\$2, 186, 000
Louisiana.....	401, 760	1, 024, 000			291, 602	944, 000
Mississippi.....	188, 926	319, 000	689	23, 000		
New Orleans.....			356, 781	1, 567, 000		

92 In addition to facilitating transfers of power between system companies, the unified operation, in certain instances, has also made possible larger sales of power to other utility interest than might otherwise be feasible. Thus, in 1952, the system sold to TVA 689,572 MKWH for \$3,449,267. While substantially all of this power was delivered for the account of Mississippi, it was made possible only by deliveries of power from Arkansas and Louisiana.

Arkansas, Louisiana, and Mississippi are subject to the jurisdiction of the Federal Power Commission.⁹ In addition, Arkansas is subject to regulation by the Arkansas Public Service Commission, Louisiana is subject to regulation by the Louisiana Public Service Commission, and New Orleans is subject to regulation by the Commission Council of the City of New Orleans.

In our Findings on the Electric plan and based upon the record theretofore developed in proceedings concerning that company and its subsidiaries, we made the following finding (Holding Company Act Release No. 8889 at p. 11):

“The record indicates that the electric properties of the four operating companies are interconnected and that since 1930 they have been constructed and operated on a systemwide basis. This system has a common dispatcher and an operating committee which forecasts the loads, prepares over-all
 93 schedules and gives general directions to the dispatcher.¹⁰ The construction requirements of the companies are formulated on a system rather than on an individual

⁹ New Orleans states that it is not subject to the jurisdiction of the Federal Power Commission.

¹⁰ See footnote on p. 115.

basis. Thus, the determination of sites and ownership of generating facilities has been on the basis of the most economical and efficient installation from the viewpoint of the system's load requirements rather than the requirements of the individual companies.

Based upon the record developed in the Electric proceedings and supplemented by the instant proceedings, we conclude that the electric system of Middle South constitutes an integrated public utility system. In reaching this conclusion, we have considered the long historical record of unified operations of the electric facilities, the extent of regulation by State Commissions, and the fact that the system is not so large as to impair the effectiveness of regulation in any of the states in which the company operates. We have also considered the high degree of coordination which, in part, appears to be due to common control, leading in turn to common planning development.

We turn now to a discussion of the Louisiana gas system.

Louisiana Gas Properties

94 As previously noted, Louisiana owns and operates electric and gas properties in the State of Louisiana. Its gas operations are conducted in an area contiguous to the City of New Orleans, and also in the northeastern portion of the State of Louisiana. As of December 31, 1952, Louisiana supplied gas service to approximately 55,000 customers in 48 communities. For the twelve months ended December 31, 1952, its total gas operating revenues were \$3,977,364 and its total gas operating revenue deductions were \$3,419,388.⁹ For the same period the total operating revenues of the Middle South system were \$116,055,327 and total system operating revenue deductions were \$92,702,296.

It has been judicially determined that both electric and gas properties cannot be retained together as a single integrated public utility system,¹⁰ and that if a holding company desires

⁹ These deductions represent the cost of gas purchased, and that portion of Louisiana's expenses allocated by it to the gas operations.

¹⁰ *The Philadelphia Company, et al v. S. E. C.*, 177 F. 2d 720, 723 (C. A. D. C. 1949).

to retain an integrated gas utility system in addition to an integrated electric utility system, such retention must be justified under the additional standards set forth in Section 11 (b) (1) (A) (B) and (C).¹¹ For the purposes of this proceeding, we need not determine whether the gas properties of Louisiana constitute one or more additional systems, and, in fact, no evidence was adduced on that point. We may assume, however, for the purposes of discussion, that the northern and southern gas properties of Louisiana constitute an integrated public utility system as defined in Section 2 (a) (29) (B). We must consider then whether the standards of Clause (A) of Section 11 (b) (1) are met. In order to meet the burden imposed by that clause, the respondent must show that "each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system".

The general framework of the Act as well as its legislative history demonstrates the intention of permitting the retention of additional systems only where such additional system is so small that it could not operate economically under separate management.¹² It is clear that the gas properties of Louisiana are capable of effective and economical operation as a separate entity, and are, in fact, larger than many completely independent systems. We note in this connection that two of Louisiana's sister companies, Arkansas and Mississippi, have disposed of their gas properties which are now independently operated.

—We have previously pointed out that the separation of electric and gas utility systems from common control frequently results in some increase in operating expenses due to the elimi-

¹¹ The Philadelphia Company, et al., Holding Company Act Release No. 8242 (June 1, 1948).

¹² Cong. Rep. on S. 2796, H. R. Rep. No. 1903, 74th Cong., 1st Sess. p. 71; 79 Cong. Rec. 14479 (Aug. 24, 1935); *The North American Company v. S. E. C.*, 327 U. S. 686, 696-697 (1946).

96 nation of certain types of savings which common control has permitted.¹³ However, the statutory criterion for retention stated in Section 11 (b) (1) (A) of the Act is not whether there is some additional expense. For the loss of economies to be "substantial" they must be "important" in the sense that they are of such magnitude as to cause a serious economic impairment of the system.¹⁴ There is no evidence in this case to warrant the conclusion that separation of the gas and electric properties of Louisiana would cause the serious economic impairment of the gas system or that the gas properties could not operate effectively and efficiently under separate ownership.

Louisiana sought to show that the separation of the gas and electric properties would result in additional expense to both the gas and electric operations, relying upon the testimony of its president, based upon his experience in operating the company as a combined electric and gas company. No study of any kind was introduced to show what the expense of the gas properties would be if they were to be operated as a separate unit. The company introduced into the record an exhibit summarizing the results of a personnel study designed to ascertain how many employees of Louisiana could be released to go with the gas properties if such properties were disposed of. On December 31, 1952 Louisiana had 1,501 employees of which 816 devoted their full time to electric operations, 161 devoted their full time to gas operations and 524 performed combined operations. Louisiana's witness estimated that if the gas properties were disposed of, 213 employees
 97 would be released. These would include all employees devoting full time to the gas operations plus 52 of the 524 employees engaged in both gas and electric operations. The same witness testified that in his opinion separation of facilities would result in increasing the cost of electric operations by from \$400,000 to \$450,000 as compared with total

¹³ Engineers Public Service Company, 12 S. E. C. 41 (1942); The Philadelphia Company, *supra*; The North American Company, 11 S. E. C. 194 (1946).

¹⁴ General Public Utilities Corporation, Holding Company Act Release No. 10982, p. 24 and footnote 23 therein (December 28, 1951).

operating expenses allocated to gas operations of approximately \$962,000 (excluding cost of purchased gas).

As indicated, the estimate of "loss of economies" does not relate directly to the additional expense that might be incurred by a separated gas system, but rather was restricted to the additional expense that might be incurred by the electric properties of Louisiana. We have previously held that the losses in economies which may be considered under Clause A of Section 11 (b) (1) are limited to those directly related to the additional system sought to be retained and not to the principal system, and that the company has the burden under the Act of demonstrating by clear and convincing evidence that such substantial economies would be lost were the gas properties not permitted to be retained.¹⁵ Further, even
 98 if the "loss of economies" to the principal system were a relevant factor, the estimate should have been based upon all the electric operations of the principal system, that is, the entire Middle South electric system, and not merely to the operation of a single company.¹⁶

We cannot find that the mere statement by the witness for the company that there would be a substantial increase in the expenses of the gas operations if they were separated sustains the burden set forth in the statute. Moreover, even if the question of increased expenses to the independent electric operations of one company were pertinent to the issue at hand, and we have found that it is not, we could not find that the company had sustained its burden. The personnel study previously referred to appears to have been of a cursory nature without support of any underlying data which could be used to test the opinion of the witness. Furthermore, even were we to accept the opinion of the company that the operating ex-

¹⁵ The Philadelphia Company, et al., Holding Company Act Release No. 8242, (June 1, 1948); The North American Company, 11 S. E. C. 194 (1942); Engineers Public Service Company, 12 S. E. C. 41 (1942); Cities Service Power & Light Company; 14 S. E. C. 28 (1943); The Middle West Corporation, 15 S. E. C. 309 (1944); Cities Service Company, 15 S. E. C. 962 (1944); The North American Company, 11 S. E. C. 194, 208 (1942), affirmed sub nom *The North American Company v. S. E. C.* 144 F. 2d 148 (C. A. 2, 1943), 327 U. S. 686 (1946).

¹⁶ General Public Utilities Corporation, Holding Company Act Release No. 10982 (December 28, 1951).

penses of the electric department of Louisiana would be increased in an amount of between \$400,000 and \$450,000, we could not find that that would constitute the loss of "substantial economies". Such increased expenses would amount to only 0.34% to 0.39% of the consolidated revenues of Middle South and 0.73% to 0.82% of the consolidated operating expenses. These percentages are lower than those which we have rejected in previous cases.¹⁷

99 Louisiana also contends that the gas properties which are located in the area adjacent to the City of New Orleans are so inter-related with the gas properties of New Orleans as to constitute an integrated system. Primarily this contention was based upon the fact that the area adjacent to New Orleans served by Louisiana has a common economic interest with the City of New Orleans. The witness for Louisiana admitted, however, that there was no interchange of gas between New Orleans and Louisiana; that only a very small amount of gas was supplied to Louisiana from the lines of New Orleans and in that case New Orleans was acting merely as a conduit for the supplier of the gas; that there were separate property bases; that the two properties were subject to different regulation, Louisiana being subject to the Louisiana Public Service Commission, and New Orleans being subject to the City of New Orleans; that there was no common operation or common planning with respect to the separate properties, and that in the final analysis the alleged integration existed only by reason of the facts that the common stocks of both companies were owned by Middle South; that both companies purchased their gas primarily from United Gas Pipe Line Company; and there was a geographic homogeneity in the area served.

It is our conclusion that respondent has failed to establish that separation of the Louisiana gas properties would result in the loss of substantial economies (contemplated by Clause (A) of Section 11 (b) (1)), such as to justify the retention of an additional system, and we further conclude that the gas

¹⁷ See: The Philadelphia Company, et al., *supra*; General Public Utilities Company, *supra*.

properties cannot be retained together with the electric
 100 properties of Louisiana. Our order to be entered herein
 will, therefore, direct Louisiana and Middle South to
 divest themselves of their interests in the Louisiana gas
 properties.

New Orleans

As previously indicated, New Orleans conducts electric, gas
 and transportation operations in the City of New Orleans. For
 the twelve months ended December 31, 1952, its operating
 revenues aggregated \$39,185,905, divided as follows: electric-
 ity—\$22,122,180; gas—\$8,108,960; transportation—\$8,954,-
 765. In the same period, the consolidated operating revenues
 of the Middle South system were \$116,055,327. Electric op-
 erations of New Orleans for this period accounted for approxi-
 mately 19% of the consolidated operating revenues while the
 gas operating revenues were approximately 7%, and the trans-
 portation operating revenues were approximately 7.7% of the
 consolidated revenues.

New Orleans' operations of the electric, gas, and transpor-
 tation services are conducted pursuant to indeterminate per-
 mits granted by ordinances of the Commission Council of the
 City of New Orleans, supplementary to an ordinance adopted
 in 1922 commonly known as the "Settlement Ordinance".
 That Ordinance provides, among other things, for the estab-
 lishment and continuing determination of the Company's rate
 base, the rate of return on the rate base, and the rates and
 fares to produce such return. It also provides that the City
 have a perpetual option to purchase parts or all of the prop-
 erty, at the rate base values. The Settlement Ordinance, as
 supplemented, limits dividends that may be paid on the
 101 common stock of New Orleans to an amount not to
 exceed \$2.25 per share per annum, and provides for an
 allowable rate of return on the rate base of 7½% per annum.
 The record indicates that at no time has the Company earned
 a return as high as 7½% and that as a matter of practice the
 amount which they may earn is limited to the \$2.25 per share
 which the Company is allowed to pay out as dividends plus
 a small additional amount.

The Commission Council of the City of New Orleans exercises complete regulatory jurisdiction over the Company with respect to rates, accounting, property acquisitions, and issuance of securities.

The record contains an affidavit of the Commissioner of Public Utilities of the City of New Orleans which sets forth a statement of policy of the City concurred in by the Mayor of New Orleans and all the members of the Commission Council of the City. That statement of policy sets forth that the unified operation of electric, gas and transportation operations by New Orleans is the result of careful planning on the part of the City and is designed "to foster and safeguard the benefits which this City acquired for itself in connection with the 1922 reorganization."¹⁸ That statement of policy also sets forth that the City "has certain well defined legal rights to have the operations continue as they have" and that "For both legal and practical reasons therefor, the City will firmly enforce its rights and protect the benefits which it enjoys under the present local franchise situation."

The Commissioner of Public Utilities of the City of New Orleans testified that not only the regulatory officials but also the public of the City recognized that the transportation operations of New Orleans were subsidized by the other properties. He stated that he had seen to it that there was publicity to acquaint the citizens of New Orleans with the fact of subsidization so that they would know that the 7c transportation fare in the City of New Orleans was possible only in this way and that the electric and gas consumers were paying for it.

In view of the expressed policy of the City with respect to its strong desire for continued unified operations and in view of the New Orleans franchise situation, we do not propose at this time to take any action with respect to the gas and transportation properties of New Orleans under the standards of Section 11 (b) (1) of the Act. We have already found that the electric operations constitute part of the integrated system of Middle South.

¹⁸ The present New Orleans Company emerged from a reorganization of separate companies conducting utility operations in the City of New Orleans.

Other Properties

Arkansas owns certain steam properties, and Louisiana and Mississippi own certain water properties. These properties have an aggregate carrying value of less than \$500,000. It is clear that these other properties cannot constitute additional businesses under the standards of the Act and no effort has been made to justify their retention. In fact, the record indicates that efforts are being made to dispose of them.

103 Action To Be Taken:

We have heretofore concluded that the electric system of Middle South constitutes a unified and integrated utility system and that it constitutes the principal system of Middle South. We have also indicated that the gas properties of Louisiana, the steam business of Arkansas and the water properties of Louisiana and Mississippi cannot be retained under the standards of Section 11 (b) (1).

An appropriate order will issue in accordance with this Opinion and releasing jurisdiction heretofore reserved in the Electric proceedings.

By the Commission (Commissioners McEntire, Rowen, and Adams), Chairman Cook not participating.

[SEAL]

ORVAL L. DUBOIS,
Secretary.

APPENDIX A

MIDDLE SOUTH UTILITIES, INC., AND SUBSIDIARIES
[Consolidating Balance Sheet, December 31, 1952]

Assets	Consolidated	Middle South Utilities, Inc.	Arkansas Power & Light Co.	Louisiana Power & Light Co.	Mississippi Power & Light Co.	New Orleans Public Service, Inc.	Gentilly Development Co., Inc.
Plant, Property and Equipment:							
Electrical Utility Plant	\$381,552,818		\$151,275,361	\$82,053,990	\$73,933,582	\$74,289,885	
Natural Gas Utility Plant	28,819,719			7,645,715		21,174,004	
Transportation Plant	15,968,812					15,968,812	
Construction Work in Progress	26,605,093		15,169,189	5,479,694	5,956,210		
Other	417,249			190,499	226,750		
Plant Acquisition Adjustments:							
Electric	12,255,874		4,990,986	3,782,140	3,482,748		
Natural Gas	351,134			351,134			
Total Plant, Property and Equipment	465,970,699		171,435,536	99,503,172	83,599,290	111,432,701	
Less Reserves for:							
Property Depreciation or Retirement	70,534,899		17,348,276	16,944,016	9,849,404	26,393,203	
Amortization of Utility Plant Acquisition Adjustments	6,403,983		1,618,710	2,688,868	2,096,405		
Total	76,938,882		18,966,986	19,632,884	11,945,809	26,393,203	
Plant, Property and Equipment, less reserves	389,031,817		162,468,550	79,870,288	71,653,481	85,039,498	
Investment and Fund Accounts:							
Subsidiaries Consolidated:							
Arkansas Power & Light Company		\$46,746,567					
Louisiana Power & Light Company		20,225,084					
Mississippi Power & Light Company		22,882,078					
New Orleans Public Service, Inc.		31,573,989					
Gentilly Development Company, Inc.		366,206					
Other	828,187	363,455	137,167	27,029	83,756	49,003	\$167,777
Total Investment and Fund Accounts	828,187	122,157,379	137,167	27,029	83,756	49,003	167,777
Current Assets:							
Cash	20,141,368	3,549,499	6,038,229	2,596,862	3,088,349	4,832,683	35,746
Special Deposits	2,983,732	2,161,730	165,622	9,597	128,320	518,463	
Working Funds	406,715	800	114,678	107,415	129,874	53,948	
Temporary Cash Investments—U. S. Government Obligations	20,791,493	3,200,135	7,977,836	75,440	2,993,135	6,544,947	
Other	15,305,351	609,605	5,559,929	2,731,461	2,436,397	4,882,790	6,491
Total Current Assets	59,628,659	9,521,769	19,856,294	5,520,775	8,776,075	16,832,831	42,237
Deferred Debits	1,063,553		930,285	3,595	129,670		
Total	450,552,216	131,679,148	173,392,299	85,421,687	80,642,982	101,921,332	210,014

MIDDLE SOUTH UTILITIES, INC., AND SUBSIDIARIES

[Consolidating Balance Sheet December 31, 1952]

Liabilities	Consolidated	Middle South Utilities, Inc.	Arkansas Power & Light Co.	Louisiana Power & Light Co.	Mississippi Power & Light Co.	New Orleans Public Service, Inc.	Gentilly Development Co., Inc.
Capital Stock and Surplus:							
Middle South Utilities, Inc.:							
Common Stock (no par value)—Authorized, 7,500,000 shares; Issued and Outstanding, 6,650,000 shares	\$116,552,050	\$116,552,050					
Subsidiaries:							
Preferred Stocks (stated at liquidation value of \$100 a share)	27,519,600		\$9,350,000	\$5,942,200	\$4,447,600	\$7,779,800	
Common Stock of New Orleans Public Service Inc.—53,703,957 shares	1,342,599		48,250,000	17,000,000	21,000,000	27,817,395	\$73,909
Total Capital Stock	145,414,249	116,552,050	57,600,000	22,942,200	25,447,600	35,597,195	73,909
Premium on Preferred Capital Stock	276,953						
Minority Interest in Surplus of New Orleans Public Service Inc.	350,663						
Surplus:							
Capital	9,108,469	9,108,469					307,476
Earned, Less Amount Applicable to Minority Interests	17,580,557	3,053,093	3,860,440	7,164,930	5,450,621	7,265,373	(175,494)
Total Surplus	26,689,026	12,161,562	3,860,440	7,164,930	5,450,621	7,265,373	131,982
Total Capital Stock and Surplus	172,730,891	128,713,612	61,460,440	30,107,140	40,898,221	43,139,521	205,891
Long-Term Debt—Subsidiaries:							
First Mortgage Bonds	200,007,410		86,200,000	35,333,110	35,500,000	42,974,300	
3½% Sinking Fund Debentures due 1974	8,300,000		8,300,000				
Other	12,956,748		2,500,000	8,375,250	2,081,498		
Total Long-Term Debt	221,264,158		97,000,000	43,708,360	37,581,498	42,974,300	
Total Capitalization	393,995,049	128,713,612	158,460,440	73,815,490	68,479,719	86,113,821	205,891
Current Liabilities	46,534,415	2,965,536	12,971,314	9,058,332	10,827,533	11,628,899	4,123
Deferred Credits	3,272,391		1,213,845	735,392	420,494	902,660	
Reserves not shown elsewhere	4,941,403		231,224	808,032	626,195	3,275,952	
Contributions in Aid of Construction	1,808,958		515,476	1,004,441	289,041	3,275,952	
Total	450,552,216	131,679,148	173,392,299	85,421,687	80,642,982	101,921,332	210,014

() Indicates red figure.

APPENDIX B

MIDDLE SOUTH UTILITIES, INC., AND SUBSIDIARIES

[Consolidating Statement of Income, 12 Months Ended December 31, 1952]

Subsidiaries	Consolidated totals	Middle South Utilities, Inc.	Arkansas Power & Light Co.	Louisiana Power & Light Co.	Mississippi Power & Light Co.	New Orleans Public Service, Inc.	Gentilly Development Co., Inc.
Operating Revenues:							
Electric.....	\$94,927,405		\$36,393,281	\$20,112,351	\$22,430,853	\$22,122,180	
Natural gas.....	12,086,069			3,977,364		8,108,960	
Transportation.....	8,954,765					8,954,765	
Other.....	87,088			25,366	61,722		
Total Operating Revenues	116,055,327		36,393,281	24,115,081	22,492,575	39,185,905	
Operating Revenue Deductions:							
Operating Expenses.....	54,751,025		16,220,859	11,658,320	11,003,264	22,000,697	
Amortization of utility plant acquisition adjustments.....	278,116			278,116			
Property depreciation or retirement reserve appropriations.....	11,158,610		3,337,050	2,251,500	1,870,060	3,700,000	
Taxes—other than income.....	10,437,342		2,235,570	1,725,064	1,535,644	4,941,064	
Provision for income taxes:							
Federal (no excess profits tax) Provision before effect of amortization of emergency facilities.....	15,933,221		5,270,969	3,826,484	3,419,768	3,416,000	
Reduction due to amortization of emergency facilities.....	(1,113,263)		(574,349)		(538,914)		
State.....	1,256,645		558,241	149,384	415,020	134,000	
Total Operating Revenue Deductions	92,702,296		27,048,340	19,888,868	17,704,842	34,191,761	
Net Operating Revenues	23,353,031		9,344,941	4,226,213	4,787,733	4,994,144	
Rent for Lease of Plants.....	373,084		373,084				
Operating Income	22,979,947		8,971,857	4,226,213	4,787,733	4,994,144	
Other Income (net).....	390,594		154,222	4,593	78,654	146,732	\$6,393
Gross Income	23,370,541		9,126,079	4,230,806	4,866,387	5,140,876	6,393
Interest to Public and Other Deductions:							
Interest on long-term debt.....	6,396,729		2,718,834	1,189,364	1,128,031	1,360,500	
Other deductions.....	456,481		136,294	(97,732)	146,590	271,329	
Interest to Public and Other Deductions—Net	6,853,210		2,855,128	1,091,632	1,274,621	1,631,829	
Net Income	16,517,331		6,270,951	3,139,174	3,591,766	3,509,047	6,393

(Concluded on page following)

APPENDIX B (page 2)

MIDDLE SOUTH UTILITIES, INC., AND SUBSIDIARIES

[Consolidating Statement of Income, 12 Months Ended December 31, 1952—Concluded]

	Consolidated Totals	Middle South Utilities, Inc.	Arkansas Power & Light Co.	Louisiana Power & Light Co.	Mississippi Power & Light Co.	New Orleans Public Serv- ice, Inc.	Gentilly De- velopment Co., Inc.
Net Income (carried forward) -----	\$16, 517, 331		\$6, 270, 951	\$3, 139, 174	\$3, 591, 766	\$3, 509, 047	\$6, 393
Preferred Dividends to Public (full requirements) -----	1, 601, 538		608, 609	356, 532	266, 856	369, 541	
Balance -----	14, 915, 793		5, 662, 342	2, 782, 642	3, 324, 910	3, 139, 506	6, 393
Portion Applicable to Minority Interests in Common Stock -----	151, 528					151, 528	
Equity of Middle South Utilities, Inc. in Net Income of Subsidiaries -----	14, 764, 265		5, 662, 342	2, 782, 642	3, 324, 910	2, 987, 978	6, 393
<i>Middle South Utilities, Inc.</i>							
Equity of Middle South Utilities, Inc. in Net Income of Subsidiaries -----	14, 764, 265		5, 662, 342	2, 782, 642	3, 324, 910	2, 987, 978	6, 393
Gross Income:							
From Subsidiaries -----		\$9, 864, 330					
Other Income -----	50, 869	50, 869					
Total -----	14, 815, 134	9, 915, 199	5, 662, 342	2, 782, 642	3, 324, 910	2, 987, 978	6, 393
Expenses -----	558, 905	558, 905					
Balance -----	14, 256, 229	9, 356, 294	5, 662, 342	2, 782, 642	3, 324, 910	2, 987, 978	6, 393
Other Interest Deductions -----	21, 986	21, 986					
Balance Before Provision for Federal Tax on Income -----	14, 234, 243	9, 334, 308	5, 662, 342	2, 782, 642	3, 324, 910	2, 987, 978	6, 393
Provision for Federal Tax on Income -----	723, 000	723, 000					
Consolidated Net Income -----	13, 511, 243	8, 611, 308	5, 662, 342	2, 782, 642	3, 324, 910	2, 987, 978	6, 393

() Indicates red figure.

108 Before the Securities and Exchange Commission

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COM-
PANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW ORLEANS
PUBLIC SERVICE, INC., RESPONDENTS

(File No. 59-100)

(Public Utility Holding Company Act of 1935)

IN THE MATTER OF ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

(Public Utility Holding Company Act of 1935)

*Order under Section 11 (b) (1) requiring divestment by regis-
tered holding company of certain non-retainable properties,
and order releasing jurisdiction*

March 20, 1953

The Commission having, on March 7, 1949, issued its Order
in proceedings concerning Electric Power & Light Corpora-
tion ("Electric"), then a registered holding company, under
Section 11 (e) of the Public Utility Holding Company
109 Act of 1935 ("Act"), approving a plan providing,
among other things, for the creation of a new holding
company, Middle South Utilities, Inc. ("Middle South"), and
reserving jurisdiction with respect to the Section 11 problems
of Middle South; and

The Commission having, on January 29, 1953, instituted
proceedings directed to Middle South and its subsidiaries,
Arkansas Power & Light Company ("Arkansas"), Louisiana
Power & Light Company ("Louisiana"), Mississippi Power &
Light Company ("Mississippi"), and New Orleans Public
Service, Inc. ("New Orleans") to determine the action neces-
sary to be taken by such respondents under Section 11 (b) (1)
of the Act, and on the basis of the Commission's Findings and
Opinion issued this date:

It is ordered, Pursuant to Section 11 (b) (1) of the Act, that Middle South and its subsidiaries dispose or cause the disposition of their direct and indirect ownership in the non-electric properties owned by Arkansas, Louisiana and Mississippi in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder; and

It is further ordered, That jurisdiction heretofore reserved in our Order of March 7, 1949 (File No. 54-139) with respect to the Section 11 problems of Middle South be, and the same hereby is, released; and

It is further ordered, That jurisdiction be, and the
110 same hereby is, reserved to take such further steps as are necessary and appropriate to carry out the terms of this order.

By the Commission.

ORVAL L. DuBOIS,
Secretary.

Before the Securities and Exchange Commission

(Holding Company Act Release No. 12978)

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COM-
PANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW ORLEANS
PUBLIC SERVICE, INC., RESPONDENTS

(File No. 59-100)

ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

LOUISIANA POWER & LIGHT COMPANY, LOUISIANA GAS SERVICE
CORPORATION

(File No. 70-3315)

LOUISIANA POWER & LIGHT COMPANY

111

(File No. 31-620)

(Public Utility Holding Company Act of 1935)

Findings and opinion.

September 13, 1955

Reopening of Proceedings

Modification of Prior Order

Where offer of proof in support of petition to reopen pro-
ceedings and modify order entered requiring the divestment of
certain properties pursuant to Section 11 (b) (1) of the Public
Utility Holding Company Act does not show that the condi-
tions on which the order was based do not exist, petition denied.

Appearances:

Robert A. Ainsworth, Jr., of Ainsworth & Ainsworth, for
Louisiana Public Service Commission.

J. Raburn Monroe, for Louisiana Power and Light
Company.

Daniel James, of Cahill, Gordon, Reindel and Ohl, for Middle South Utilities, Inc.

Jerome M. Alper, and Willis C. McDonald and Harold A. Buchler, of McDonald and Buchler, and Fred G. Benton, Sr., of Benton & Mosley, for Jefferson Parish, Louisiana.

Solomon Freedman, and Robert Hislop, for Division of Corporate Regulation.

Louisiana Power & Light Company ("Louisiana Power") a public-utility subsidiary of Middle South Utilities, Inc., a holding company registered under the Public Utility Holding Company Act of 1935 (the "Act"), and Louisiana Gas Service Corporation ("Louisiana Gas"), a recently organized subsidiary of Louisiana Power, have filed a joint application-declaration pursuant to the Act relating to the proposed transfer by Louisiana Power of its non-electric properties to Louisiana Gas at their net book cost upon payment by Louisiana Gas of cash and 379,000 shares of \$10 par value stock of Louisiana Gas.

By order dated March 20, 1953, this Commission directed Louisiana Power, which is engaged in the electric, gas and water businesses, to dispose of its non-electric properties pursuant to Section 11 (b) (1) of the Act.¹ The application-declaration states that Louisiana Power, which has also applied for an order under Section 3 (a) (4) of the Act exempting it from registration as a holding company, expects to dispose of the stock of Louisiana Gas to be acquired, but that the manner of disposition has not been determined. Louisiana Gas proposes to raise cash for the acquisition and subsequent development of the properties by a private sale of first mortgage bonds.

We issued a notice of filing of the above summarized application-declaration which stated that interested person might request a hearing thereon.² The Louisiana Public Service

¹ Middle South Utilities Inc. et al., Holding Company Act Release No. 11782.

² Louisiana Power & Light Company, Holding Company Act Release No. 12740 (December 13, 1954).

Commission ("The Louisiana Commission"), a regula-
 113 tory administrative tribunal having jurisdiction under
 Louisiana law of public utility companies operating in
 Louisiana, filed a petition for a hearing with respect to such
 application-declaration. In addition, the Louisiana Commis-
 sion requested the reopening of the Section 11 (b) (1) pro-
 ceedings in which we entered our order of March 20, 1953
 directing that Louisiana Power dispose of its non-electric
 properties.

In response to our suggestion, the Louisiana Commission
 filed an offer of proof and a brief in support thereof. Louisi-
 ana Power filed a brief expressing the desire to be permitted
 to retain its gas properties. Jefferson Parish, Louisiana, filed
 a brief opposing the reopening of the record in the Section 11
 (b) (1) proceedings and the proposal to transfer the non-
 electric properties of Louisiana Power to Louisiana Gas and
 related transactions. Our Division of Corporate Regulation
 also filed a statement of position and brief opposing reopening
 of the record. We heard oral argument with respect to the
 question of reopening the record.

We are of the opinion that no basis for reopening the pro-
 ceedings culminating in our order of March 20, 1953 has been
 shown. Those proceedings involved a full hearing at which
 Louisiana Power, and its parent, Middle South Utilities, Inc.,
 appeared, adduced evidence and presented arguments that
 Louisiana Power could retain its gas properties consistently
 with the standards of Section 11 (b) (1) of the Act. The
 Louisiana Commission, although duly notified of the proceed-
 ings, did not appear and took no part therein. After full
 consideration we issued a Findings and Opinion which
 114 set forth in detail the reasons why the standards of Sec-
 tion 11 (b) (1) would not permit the retention of the
 non-electric properties of Louisiana Power. No petition for
 a review of our order was filed.

Under Section 11 (b) this Commission may "revoke or mod-
 ify any order previously made under this subsection if, after
 notice and opportunity for hearing, it finds that the conditions
 upon which the order was predicated do not exist." We have
 carefully considered the offer of proof made by the Louisiana

Commission and the arguments relating thereto and are of the opinion that no grounds for questioning our earlier conclusion and no changed circumstances justifying a modification of our order have been indicated. The Louisiana Commission has not alleged or indicated that the conditions on which our order was based do not exist. In its offer of proof, the Louisiana Commission merely sought to show that independent operation of the gas system would increase expenses.³ Our Findings and Opinion accompanying our order of divestment recognized that separation of electric and gas utility systems from common control frequently results in some increase in operating expenses. We there pointed out that under Section 11 (b) (1) Louisiana Power could retain its gas operations only if they were so small that they could not operate economically under separate management, and we found that it was clear that the Louisiana Power's gas properties are capable of effective and economical operation as a separate
 115 entity. The Louisiana Commission in its offer of proof did not allege or indicate that this conclusion was incorrect.

Accordingly, we shall deny the petition of the Louisiana Commission insofar as it requests the reopening of the proceedings in which our order of March 20, 1953 was entered. Pursuant to the request of that Commission a hearing will be scheduled on the application-declaration covering the proposed transfer of non-electric properties by Louisiana Power to Louisiana Gas and related matters. However, such hearing shall be strictly limited to matters relevant to the application-declaration and shall in no way involve any question as to the permanent retainability of the non-electric properties of Louisiana Power.

An appropriate order will issue.

By the Commission (Chairman Armstrong and Commissioners Adams, Goodwin, and Orrick), Commissioner Patterson not participating.

ORVAL L. DUBOIS,
Secretary.

³The facts alleged and the argument in the Louisiana Commission's offer of proof were challenged by Jefferson Parish and the Division.

116 Before the Securities and Exchange Commission

IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS
POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT
COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW
ORLEANS PUBLIC SERVICE, INC., RESPONDENTS

(File No. 59-100)

ELECTRIC POWER & LIGHT CORPORATION

(File No. 54-139)

LOUISIANA POWER & LIGHT COMPANY, LOUISIANA
GAS SERVICE CORPORATION

(File No. 70-3315)

LOUISIANA POWER & LIGHT COMPANY

(File No. 31-620)

(Public Utility Holding Company Act of 1935)

*Order denying petition to reopen prior proceedings
and modify order*

September 13, 1955

The Commission having on March 20, 1953 in proceedings pursuant to Section 11 (b) (1) of the Public Utility Holding Company Act of 1935, entered an order directing that
117 Louisiana Power and Light Company dispose of its non-electric properties, and the Louisiana Public Service Commission having filed a petition seeking, among other things, to reopen the aforesaid proceedings and modify the aforesaid order, and having filed an offer of proof and a brief in support thereof;

Briefs having also been filed by Louisiana Power and Light Company, Jefferson Parish, Louisiana, and the Division of Cor-

porate Regulation of the Commission, and the Commission having heard oral argument;

The Commission having this day issued its Findings and Opinion, on the basis thereof

It is ordered, That the aforesaid petition of Louisiana Public Service Commission to the extent that it requests reopening of the aforesaid Section 11 (b) (1) proceedings be, and it hereby is, denied.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

141 *Minute entry of argument and submission*
June 2, 1956

[Omitted in printing.]

142 [File endorsement omitted.]

In the United States Court of Appeals for the Fifth Circuit

No. 15820

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER
versus

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

**PETITION FOR REVIEW OF ORDER OF THE SECURITIES AND
EXCHANGE COMMISSION**

Before RIVES, TUTTLE and JONES, Circuit Judges.

Opinion

June 30, 1956

TUTTLE, Circuit Judge: This is a petition to review an order of the Securities and Exchange Commission denying a petition to reopen and receive new evidence in proceedings which culminated in a Commission order of March 20, 1953, directing

a public utility holding company and three of its subsidiaries to dispose of their direct and indirect ownership in certain non-electric properties. The Securities and Exchange Commission opposes the petition for review on the grounds that the denial of a petition to reopen proceedings is not a reviewable order under Section 24 (a) of the Public Utility Holding Company Act, 15, U. S. C. A. § 79x, and that, in any event, the petition to reopen was without merit.

The Securities and Exchange Commission issued an earlier order regarding these properties on March 7, 1949, when it approved a plan for the dissolution of the Electric Power & Light Corporation and the creation of Middle South Utilities, Inc., which acquired from the Electric Power & Light Corporation the latter's sole ownership of the Arkansas Power & Light Company, the Louisiana Power & Light Company, and the Mississippi Power & Light Company. It also acquired from the Electric Power & Light Corporation 95.2% of the common stock of New Orleans Public Service, Inc., and all of the securities of the Gentilly Development Company, a non-utility land company. The Securities and Exchange Commission, in approving the plan, reserved jurisdiction to make further findings under Section 11 of the Act, 15 U. S. C. A. § 79k, regarding the integrated character of the electric properties of Middle South's subsidiaries, and the retainability of non-electric properties by these companies.

Subsequent to this order, the Arkansas Power & Light Company and the Mississippi Power & Light Company disposed of nearly all their non-electric properties and thereafter engaged almost exclusively in electric operations. The Gentilly Development Company disposed of its land and had only cash as a major asset. The Louisiana Power & Light Company, however, retained both electric and gas properties, and New Orleans Public Service, Inc., continued to engage in electric, gas and transportation operations. In January, 1953, the Securities and Exchange Commission issued an order convening a hearing pursuant to Section 11 (b) (1) of the Act, 15 U. S. C. A. § 79k (b) (1), to decide, inter alia,

whether Middle South Utilities, Inc. and the Louisiana Power & Light Company should be required to dispose of the gas utility and non-utility assets of the Louisiana Power & Light Company, and if so, upon what terms and conditions. The named respondents were Middle South Utilities, Inc., the Arkansas Power & Light Company, the Mississippi Power & Light Company, and New Orleans Public Service, Inc. A copy of the order was served upon the petitioner here, the Louisiana Public Service Commission, by registered mail. However, the Louisiana Public Service Commission did not appear, nor did any other public body or group of public security holders appear with regard to the retainability of gas properties by the Louisiana Power & Light Company.

On March 20, 1953, the Securities and Exchange Commission issued its findings and order, which required Middle South Utilities, Inc., the Arkansas Power & Light Company, the Louisiana Power & Light Company, and the Mississippi Power & Light Company to dispose of their direct and indirect ownership in non-electric properties. New Orleans Public Service, Inc., was allowed to retain its gas and transportation properties along with its electric properties, in view of the strong desire of the City of New Orleans for New Orleans Public Service, Inc. to continue unified operations, and the special character of the franchise and regulatory system in that city.

Insofar as is pertinent here, the effect of the order was to require Middle South Utilities, Inc., the Arkansas Power & Light Company, the Louisiana Power & Light Company, and the Mississippi Power & Light Company to dispose of certain steam and water properties owned by the three subsidiaries. It likewise required Middle South Utilities, Inc. and the Louisiana Power & Light Company to divest themselves of the latter's gas properties.

No petition for review of this order was filed, and the Securities and Exchange Commission set March 20, 1955 as the deadline for compliance therewith by Middle South Utilities, Inc. and the Louisiana Power & Light Company. On November 10, 1954, the Louisiana Power & Light Company and the Louisiana Gas Service Corporation filed a joint application-declara-

tion with the Securities and Exchange Commission, proposing that the newly incorporated Louisiana Gas Service Corporation acquire all the non-electric properties of the Louisiana Power & Light Company. The Louisiana Power & Light Company was to own all the common stock of the Louisiana Gas Service Corporation. Thereafter the petitioner here, the Louisiana Public Service Commission, requested a public hearing on the matter and also asked that the Securities and Exchange Commission reopen the record in the proceeding which had resulted in the divestment order. Upon the suggestion of
 146 the Securities and Exchange Commission, petitioner filed a detailed offer of proof and a brief in support of its request. After oral argument, the Commission, by order of September 19, 1955, denied the Louisiana Public Service Commission's request that the prior proceeding be reopened. The Louisiana Public Service Commission here challenges the legality of this order.¹

We think the order of September 19 is reviewable. The order here involved is not of the type dealt with in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, but is an order based on a procedure specifically authorized by § 79k (b) of the statute.² This provision was availed of by the petitioner here by requesting that the record be reopened. The fact that the Securities and Exchange Commission considered the petition, suggested that petitioner file an offer of proof, considered the proof thus offered, and made a specific finding

¹ The Louisiana Power & Light Company intervened in this court, reiterating the arguments of the Louisiana Public Service Commission. Middle South Utilities, Inc. also intervened, stating that it was in accord with the views expressed by the petitioner and the Louisiana Power & Light Company, but strongly opposing a reopening of the record which would result in reconsideration of the status of the entire Middle South system; in effect, it desired a reconsideration only of that part of the Securities and Exchange Commission's divestment order which required the Louisiana Power & Light Company and itself to dispose of the Louisiana Power & Light Company's gas properties.

² With regard to § 11 (b) proceedings, the Act provides: "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 79x of this title." 15 U. S. C. A. § 79k (b).

that "no grounds for questioning our earlier conclusion * * * have been indicated" demonstrates that the Commission considered this procedure as a petition to modify the earlier order. The order denying this request is expressly reviewable.³

The Commission contends that the power to revoke or modify upon a finding that the conditions upon which the order was predicated *do* not exist comes into play only if a change in conditions has occurred after the entry of the earlier order.⁴ The action of the Securities and Exchange Commission here indicates that it considered that it had the duty to consider the proof that related to the conditions that existed as of the time the earlier order was entered. The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order. The language is susceptible of the construction, however, that if, in fact, it can be shown that the conditions on which the order was predicated were not truly the actual conditions, then a modification may be sought and obtained. We hold that such modification may be based on the facts as they existed at the time of the order which is to be modified.

A review of action by the Securities and Exchange Commission denying such modification is, as we have noted, expressly provided for. Such review is thus not circumscribed by the rules applying to review of discretionary acts. In passing on any petition for revocation or modification, as provided for in § 79k (b) the normal standards by which an administrative tribunal arrives at its decision would, of course, apply. There must be a basis in fact for the decision and the facts must be applied in accordance with the proper rules of law.

³ See last sentence of section 79k (b), fn. 2, *supra*.

⁴ Extensive authority for this proposition is cited in the nature of orders by the Securities and Exchange Commission. No court decision is cited to support this construction. The language of the court's opinion in *American Power Co. v. S. E. C.*, 329 U. S. 90, at p. 121, seems to indicate to the contrary.

Petitioner here contends that these standards were not met because, so it contends, the Commission misconstrued § 79k (b) (1) ⁶ in holding that the only company whose loss of substantial economies was to be considered was the projected gas company; that the loss of substantial economies to the parent Louisiana Power & Light Company resulting from the severance is not to be considered. The respondent agrees that such is its position. It says that it has consistently construed this section in the challenged manner. The Securities and Exchange Commission says in its brief that "The meaning of this clause is clear from the legislative history and from Securities and Exchange Commission and court decisions." In support of its position it quotes from the statement of the managers on the part of the House accompanying the Conference Report ⁷

and a statement made by a senator on the floor of the Senate *after* the passage of the bill, but before the President had signed it.⁸ It also cited *Philadelphia Company et al*; 28 S. E. C. 35, 52, and General Public Utility Corporation, Holding Company Act Release No. 10982, as its prior decisions on the point, and cited *Philadelphia Company v. S. E. C.* (D. C. Cir.), 177 F. 2d 720, 724, 725, as accepting without discussion the Securities and Exchange Commission's views on the matter.

We think that the language of a statute should be construed, if possible, by taking the usual intendment of the words without

⁶ This section provides that the Commission *shall* "permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

A. Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system."

⁷ This clause was inserted for the first time by the Conference Committee. This statement, as quoted in respondent's brief, was that it was a " * * * provision to meet the situation when a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems * * *."

⁸ This statement made by Senator Wheeler, quoted by the respondent's brief, was that the effect of the clause "would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems * * * were incapable of economic operation * * *."

reference to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear.

Giving to the language of § 79k (b) the meaning normally attributed to the words used, we think it quite clear that if, in fact, there is a loss of substantial economies either to the separated utility or to the parent company, then the proviso in clause A is satisfied, for in such event it is clear that "each of such additional systems [here the gas system] cannot be operated without the loss of substantial economies [to the parent company] which can be secured by the retention of control by such holding company of such system." Since the term "loss of substantial economies" is not expressly restricted in the statute to the economies relating to the operation of the additional companies, but is in terms broad enough to include the loss of substantial economies to the holding
 150 company as well, it would require judicial legislation for the court to cut it down as contended for by the Securities and Exchange Commission.

Neither the legislative history, if we are to consider that, nor the one court decision, relied on by the respondent, discussed this precise point. We cannot permit our conclusion as to the correct construction of the Act to be overborne by discussion by another court of other features of the Act from which a contrary construction can at most only be inferred. This is too important a part of the section to be interpreted by such method. Furthermore, while we recognize the merit of respondent's contention that the interpretation placed on a law by the agency enforcing it is persuasive, no one will contend that it is not, after all, the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy.

We do not make any findings here contrary to those arrived at by the Securities and Exchange Commission. We do decide that in making its findings on the crucial question of loss of substantial economies the Securities and Exchange Commis-

sion refused to give weight to important facts which, if as alleged by petitioner, would have presented an entirely different picture.⁸

There remains the question as to what is meant by the language "substantial economies." The Commission con-
 151 tends that economies are not substantial unless their loss "would cause a serious economic impairment of the system" such as "to render it incapable of independent economical operation." It cites *Engineers Public Service Co. v. S. E. C.* (D. C. Cir.), 138 F. 2d 936, and *Philadelphia Co. v. S. E. C.* (D. C. Cir.), 177 F. 2d 720, as supporting this proposition. We think neither case accepts the contention of the Securities and Exchange Commission that the words "substantial economies" must be so construed. The *Engineers Public Service Co.* case says "substantial economies must mean, as was said in *North American Company v. S. E. C.* (2 Cir.), 133 F. 2d 148, 152, 'important economies.' " To be sure there was a dissent in which Judge Soper, who wrote the opinion, favored a reversal of the order of the Securities and Exchange Commission because he thought the undisputed facts constituted a showing of "substantial economies." The majority merely felt that the evidence was not conclusive, and therefore declined to reverse the finding of the Commission. There was no specific holding by the court that the Commission's formula as to what was meant by "substantial economies" was universally applicable. Much the same is true of the later decision in the *Philadelphia Company* case. There the court affirmed an order of the Securities and Exchange Commission, in which its limiting formula had been applied. The court there said "'substantial' is a relative and elastic term." In the context of the particular case, the court then said: "We cannot find the Commission's understanding of the term 'substantial economies' is wrong."

⁸ The offer of proof included detailed computations showing anticipated losses of \$684,377 of economies to the electric Company following the dismemberment, which, when added to computed losses of \$272,816 to the gas utility, constituted a sizeable, if not a substantial, figure.

We are convinced that the formula proposed by the Commission is not one that is to be inflexibly used in the application of clause A of the saving section. We think as has been said by the Court of Appeals for the Second Circuit in *North American Company v. S. E. C.* (2 Cir.), 133 F. 2d 148, 152, and as stated in the *Engineers Public Service Company* case, *supra*, that the term "substantial economies" means important economies. The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses.⁹

Finding as we do that the Commission excluded from its consideration what, if any, economies might be lost to Louisiana Power and Electric Company in its application of Clause A, and finding as we do that the commission's concept as to what constituted "substantial economies" was too rigid, it becomes necessary for us to grant the relief requested by the petitioner and remand this proceeding to the Securities and Exchange Commission for its further consideration in the light of this opinion.

An intervention has been filed in this case by Middle South Utilities, Inc., in which the intervenor strenuously objects to any action here that would cause or authorize the reopening by the Securities and Exchange Commission of the order of March 20, 1953, as relates to the Middle South system as a whole. The further consideration to be given to this matter

by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order.

⁹ See *Engineers Public Service Co. v. S. E. C.* (D. C. Cir.), 138 F. 2d 936, 944.

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In United States Court of Appeals

No. 15820

LOUISIANA PUBLIC SERVICE COMMISSION

versus

SECURITIES AND EXCHANGE COMMISSION

Minute entry of judgment

June 30, 1956

This cause came on to be heard on the petition of Louisiana Public Service Commission for a review of an order of the Securities and Exchange Commission dated September 13, 1955, "In the Matter of Middle South Utilities, Inc., Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc., Respondents, File No. 59-100; Electric Power & Light Corporation, File No. 54-139; Louisiana Power & Light Company, File No. 61-620 (Public Utility Holding Company Act of 1935)", and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; and that this cause be, and it is hereby, remanded to the Securities and Exchange Commission for its further consideration in the light of the opinion of this Court.

* * * * *

155 [Clerk's Certificate to foregoing transcript omitted in printing.]

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

vs.

LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

Order allowing certiorari

Filed December 3, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered, That the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER
v.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH
UTILITIES, INC., AND LOUISIANA POWER & LIGHT
COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 30, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 25-35) is not yet officially reported. The findings and opinion of the Securities and Exchange Commission dated September 13, 1955, are unreported and are printed at R. 110. The findings and opinion of the Securities and Exchange Commission dated March 20, 1953, are unreported and are printed at R. 74.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (App. A, *infra*, p. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether (a) the statutory provision authorizing the revocation or modification of any final order previously entered under § 11 (b) of the Public Utility Holding Company Act of 1935, upon a showing that "the conditions upon which the order was predicated do not exist", relates to a situation where there has been no change in conditions since the entry of the original order, and (b), if so, whether legal determinations made in connection with the original order become reviewable in the review of a Securities and Exchange Commission order denying a petition to reopen the former proceeding.

2. Whether the "loss of substantial economies" that would result from the divestment of a public-utility system from the "single integrated public-utility system" to which a registered holding company is normally limited by § 11 (b) (1) of the Act—a prerequisite to retention by the holding company of "additional systems"—(a) applies solely to the additional systems sought to be retained and not to the principal system and (b) must be of a nature as to cause such a serious economic impairment of the additional system that it would render it incapable of independent economic operation.

STATUTE INVOLVED

The statutory provisions involved are §§ 2 (a) (29); 11 (b); and 24 (a) of the Public Utility Holding Company Act of 1935, 49 Stat. 804, 15 U. S. C. §§ 79b (a) (29); 79k (b); and 79x (a). They are printed in Appendix B, *infra*, pp. 36-40.

STATEMENT

On March 20, 1953, the Securities and Exchange Commission, pursuant to § 11 (b) (1) of the Public Utility Holding Company Act of 1935 (the "Act") (App. B, *infra*, pp. 37-38) ordered, *inter alia*, that Middle South Utilities, Inc. ("Middle South"), a registered holding company, and its subsidiary, Louisiana Power & Light Company ("Louisiana Power"), take appropriate steps to divest the non-electric properties of Louisiana Power, consisting primarily of gas properties (R. 109).¹ In its findings, the S. E. C. held that the electric properties of the four operating companies of the Middle South system, namely, Arkansas Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc., and Louisiana Power, constituted a single integrated electric utility system, as defined in § 2 (a) (29) (A) of the Act (App. B, *infra*, pp. 36-37), and were retainable by Middle South under the standards of § 11 (b) (1) (App. B, *infra*, pp. 37-38) (R. 93). The S. E. C. found, however, that the gas properties of Louisiana Power must be divested since (a) they did not constitute,

¹ See *Middle South Utilities, Inc.*, Holding Company Act Release No. 11782 (1953) (R. 74).

together with the electric properties of the Middle South system, a "single integrated public-utility system" within the standards of § 2 (a) (29) of the Act; and (b) they did not satisfy the proviso to § 11 (b) (1) for retention as an integrated system additional to the integrated electric utility system, since, if divested, there would be no loss of substantial economies as required by Clause (A) of the proviso (R. 93-100).

The March 20, 1953, order was entered after a full hearing at which Middle South and Louisiana Power appeared, adduced evidence, and presented arguments to support the position that the gas properties of Louisiana Power satisfied the proviso to § 11 (b) (1) for retention by Middle South as an additional integrated public-utility system. The Louisiana Public Service Commission ("Louisiana Commission"), respondent herein and petitioner below, did not appear although it received actual notice of the proceeding by registered mail (R. 113).

No petition to review the March 20, 1953, order was filed within the 60-day period provided by § 24 (a) of the Act (App. B, *infra*, pp. 39-40).

Respondent Louisiana Commission exhibited no interest in the S. E. C. determination until after an application-declaration had been filed by Louisiana Power with the S. E. C. on November 10, 1954, looking toward compliance with the March 20, 1953, order (R. 112) by proposing that the gas properties be transferred to a separate new corporation owned by Louisiana Power and that, thereafter, Louisiana Power's hold-

ings of the new corporation's stock be disposed of (R. 112). In response to a notice issued by the S. E. C. advising that interested persons could request a hearing on the application-declaration,² respondent Louisiana Commission on December 22, 1954, requested a public hearing thereon and in addition requested that the S. E. C. reopen the record in the earlier § 11 (b) (1) proceeding (R. 51-52). At the request of the S. E. C., the Louisiana Commission filed an offer of proof with exhibits (R. 113) and a brief in support of its request to reopen the record (R. 113). Nothing was offered to show that conditions had changed since the previous order has been issued. Instead, an attack was made on the factual conclusions of the S. E. C.'s findings and opinion upon which the 1953 order was entered and upon the S. E. C.'s legal interpretation, *inter alia*, of the phrase "loss of substantial economies" found in Clause (A) of § 11 (b) (1) of the Act.

After receipt of the offer of proof, the S. E. C. published a notice with respect to the Louisiana Commission's request,³ heard oral argument thereon, and by order of September 13, 1955, denied the request to reopen.⁴ In holding that there was no basis for reopening the proceeding, the S. E. C. emphasized in its findings that the offer of proof had not alleged

² *Louisiana Power & Light Company, Holding Company Act Release No. 12740 (1954).*

³ *Middle South Utilities, Inc., Holding Company Act Release No. 12892 (1955) (R. 65).*

⁴ *Middle South Utilities, Inc., Holding Company Act Release No. 12978 (1955) (R. 110).*

"changed circumstances justifying a modification"/
(R. 114).

The Louisiana Commission then filed its petition to review this order of September 13, 1955, in the court below and also stated that it sought review of the S. E. C.'s earlier order of March 20, 1953 (R. 6, 12).

The court below not only reversed the S. E. C.'s order denying the request to reopen the proceeding but also held that legal determinations made by the S. E. C. in its 1953 decision were erroneous (App. A, *infra*, pp. 25-35). Specifically, it found that the S. E. C. in refusing to reopen the earlier proceeding had misinterpreted the penultimate sentence in § 11 (b) providing that the S. E. C. might revoke or modify a previous order entered under that subsection if "it finds that the conditions upon which the order was predica' d do not exist" (App. A, *infra*, pp. 29-30). With respect to the 1953 decision, the court held that the S. E. C. had misinterpreted Clause (A) of § 11 (b) (1) in holding that the phrase "loss of substantial economies" should be interpreted to mean a loss only to the additional system to be divested and not to the electric properties which constitute the principal system retainable by the registered holding company. In addition, the court disagreed with the test applied by the S. E. C. in 1953 that a loss is not "substantial" within the meaning of the statute if it would not cause "a serious economic impairment of the system" required to be divested such as to render it incapable of independent economic operation (R. 96). The court remanded the proceeding to the

S. E. C. for its consideration in light of the court's interpretation of the Act (App. A, *infra*, p. 34).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously overruled in three particulars long-standing constructions placed by the S. E. C. on provisions of § 11 (b) of the Act. In at least one of these instances, the opinion below is in conflict with that of the Court of Appeals for the District of Columbia Circuit. If unreversed, these determinations will substantially interfere with the proper administration by the S. E. C. of § 11, recognized by this Court as the "very heart of the title." *North American Company v. S. E. C.*, 327 U. S. 686, 704, n. 14.

I

A. The Court relied upon an erroneous construction of the last two sentences of § 11 (b) to justify its review of determinations embodied in a § 11 (b) (1) order from which the time for review had long since expired. The penultimate sentence of § 11 (b) (App. B, *infra*, p. 39) provides that the S. E. C. "may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist." Contrary to the S. E. C.'s long-standing construction that to secure modification under this provision it is necessary to offer evidence of changed conditions occurring after the entry of the original order,⁵ the court in-

⁵ See e. g. *Community Gas and Power Company*, 15 S. E. C. 492, 500; *West Texas Utilities Company*, 21 S. E. C. 566;

interpreted this sentence to mean that such modification may be obtained if "it can be shown that the conditions on which the order was predicated were not truly the actual conditions . . ." (App. A, *infra*, p. 30).

If the administrative interpretation is correct, the court clearly could not have entertained review in this case since the Louisiana Commission, in its offer of proof before the S. E. C., did not present any facts indicating a subsequent change in conditions. And if the penultimate sentence of § 11 (b) is not available as a statutory basis for appeal, a denial of an out-of-time petition for rehearing before the S. E. C. is certainly not reviewable. A decision to the contrary would be in direct conflict with *Skowhegan Savings Bank v. S. E. C.*, 201 F. 2d 702, 705 (C. A. D. C.), where it was held that denial of a petition for rehearing of an order under § 11 (e) of the Act designed to effect compliance with § 11 (b) (1) "could not serve to enlarge the statutory period for appeal. The denial of reconsideration is not in and of itself appealable under the statute."⁶ Indeed it may be that

Middle West Corporation, 22 S. E. C. 87; *North American Company*, 28 S. E. C. 742, 747-756; *International Hydro-Electric System*, 30 S. E. C. 631; *General Public Utilities Corporation*, Holding Company Act Release No. 13116, page 5-11 (1956).

⁶ Cf., *I. C. C. v. City of Jersey City*, 322 U. S. 503, 514-519; *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, 137; *Comboy v. First National Bank of Jersey City*, 203 U. S. 141, 145; *Nealon v. Hill*, 149 F. 2d 883 (C. A. 9), certiorari denied, 326 U. S. 753; *Clarke v. Hot Springs Electric Light & Power Co.*, 76 F. 2d 918, 921 (C. A. 10), certiorari denied, 296 U. S. 624.

an order under the penultimate section of § 11 (b) denying a request for a rehearing is never reviewable under the authorities cited in footnote 6, *supra*, since that sentence in terms refers only to orders modifying or revoking earlier orders—not to orders which deny a request to modify or revoke.

It is the S. E. C.'s view that the penultimate sentence was inserted so it would be clear that, despite the fact that § 11 (b) orders are final and binding determinations and are appealable, they might be modified where subsequent changes of circumstances warrant such modification. This is in complete accord with *Central & South West Utilities Co. v. S. E. C.*, 136 F. 2d 273, 275 (C. A. D. C.), where it was stated that "Section 11 (b) authorizes the Commission to revoke or modify its order, after notice and hearing, in response to changed conditions..." It is also in accord with the reference to this clause in *American Power & Light Company v. S. E. C.*, 329 U. S. 90, 121, where the Court upheld a Commission order directing the dissolution of certain holding companies but stated that during the period of compliance with these orders the companies were not precluded "from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist." Nowhere in its opinion did the Court indicate that the S. E. C.'s record was possibly incomplete and the Court must have been referring to changes in conditions brought about by reason of subsequent steps to be taken by holding company systems looking toward compliance with the dissolution orders.⁷

⁷ In its brief to this Court in that case, the S. E. C. had stated that if petitioners could be transformed into holding companies

Assuming that an order *refusing* to reopen a previous proceeding is reviewable at all, the review should be limited to a consideration of whether the S. E. C. abused its discretion in failing to reopen the proceeding and not to legal determinations made in connection with the earlier order. Surely, persons aggrieved should not be permitted to do indirectly what they cannot do directly, *i. e.*, secure review of the original order after the expiration of the 60 days provided by § 24 (a) (App. B, *infra*, p. 39-40), by obtaining review of an order under § 11 (b) refusing to reopen the original proceeding. In this connection, it should be noted that under § 24 (a), even where a timely petition for review is filed, no new evidence may be considered unless "application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission." See *Central & South West Utilities Co. v. S. E. C.*, *supra*, 136 F. 2d at 275, where such an application was denied. The route pursued by the Louisiana Commission and sanctioned by the court below completely circumvented this requirement;^a the Louisiana Commission made no attempt to show "reasonable grounds for failure to adduce . . . evidence in the proceeding before the Commission."

which served the function of tying together properties satisfying the standards of Section 11 (b) (1) and needing a parent holding company, and if it appeared that either of petitioners would be an appropriate corporate vehicle for such purpose, then there would be room for modification of its orders under the express provisions of Section 11 (b) applicable in the event of change of circumstance.⁹ (Brief for the S. E. C. in Nos. 6 and 7, October Term 1945, pp. 133-134.)

B. 1. This holding of the Court of Appeals on the right of reopening a § 11 (b) proceeding, if allowed to stand, will destroy the finality of § 11 (b) determinations, which up to this decision have been generally assumed to be "final and binding determinations of the result to be achieved." *Commonwealth & Southern Corp. v. S. E. C.*, 134 F. 2d 747, 751 (C. A. 3).

The resulting delay and uncertainty will interfere with the mandate of Congress directing the S. E. C. to require compliance with the standards of § 11 (b) "as soon as practicable." It is primarily through the entry of § 11 (b) orders that the S. E. C. has been able to secure the cooperation of holding company systems in working out their problems under that section. To the extent that these orders are deprived of their finality, it can be expected that the voluntary compliance contemplated by Congress* will be substantially retarded. Furthermore, rehearings, which prior to the decision below would not have been granted, will now be required, necessitating long preparation and often involving protracted administrative proceedings and possible time-consuming appeals. And in future § 11 (b) proceeding the staff of the S. E. C., to reduce the possibility of having the proceeding reopened, will probably be required to seek out and place in evidence all possible facts bearing on all issues, even including facts required to disprove that a company comes within an exception to the general standards required by § 11 (b)—con-

* See § 11 (e) of the Act. See also S. Rep. 621, 74th Cong., 1st Sess., p. 13.

trary to accepted principles relating to the burden of proof.⁹

In view of the interest of holding company managements and their stockholders in retaining the substantial properties and security interests which are the subject of § 11 (b) orders, it may be expected that attempts will now be made to reopen existing § 11 (b) (1) and § 11 (b) (2) orders of the S. E. C. on the contention that they must be reconsidered in the light of the standards set by the court below—both the procedural standards for reopening, and with respect to § 11 (b) (1), the substantive standards discussed below (*infra*, pp. 18–23). The apparent ease by which any of the thousands of security holders of any registered holding company¹⁰ may secure reopening of an earlier § 11 (b) order will greatly increase the probability of requests to reopen, especially in light of the substantial fee a security holder would receive from the registered holding company for upsetting a previous determination by the S. E. C. under § 11.¹¹ Moreover, a security holder residing in the Fifth Circuit—who can obtain review in that jurisdiction—would be the one most likely to file a petition to review, in view of the opinion in this case.

Of the utmost importance to all registered holding company systems, particularly those whose status under § 11 (b) (1) has been thought to have been fully

⁹ See *e. g.*, *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 10.

¹⁰ According to reports filed with the S. E. C., Middle South has over 27,000 holders of its common stock.

¹¹ See *e. g.*, *Standard Gas and Electric Company, Holding Company Act Release No. 12878 (1955)*.

and finally determined long ago, is the prime fact that the opinion below places a cloud upon the findings of the S. E. C. that those systems satisfy the standards of § 11 (b) (1). For example, in situations where the Commission has in the past found that properties may be retained together as a "single integrated public utility system" within the meaning of §§ 11 (b) (1) and 2 (a) (29), it is now possible that upon the motion of a State Commission or other interested person such a proceeding, which both the S. E. C. and the industry assumed to be closed, might be reopened on the ground that the original record before the S. E. C. was incomplete.¹²

2. The extent of the impairment to the S. E. C.'s functions as the agency designated to administer the Act is of considerable moment when viewed in the light of the number of utility systems having substantial properties and security interests which might seek reopenings of § 11 (b) orders in accordance with the opinion below. In the instant case alone, as pointed out in the S. E. C.'s opinion of March 20, 1953, some 55,000 customers in 48 Louisiana communities are supplied with gas from the facilities here involved. As at December 31, 1952, the gross gas utility assets required to be divested were stated on the company's books at over \$7,500,000 and the total gas operating

¹² In this connection, it may be noted that Middle South Utilities, Inc., intervenor below, in its brief filed with the court below (at p. 3), objected to any possible reconsideration of the status of the entire Middle South system under § 11 (b) (1) which, it stated, would unsettle "all the issues which were set at rest after complex proceedings only three years ago."

revenues for the year 1952 obtained therefrom were almost \$4,000,000 (R. 94, 104).

At the present time, there are outstanding four other uncomplained-with § 11 (b) (1) orders directed to registered holding companies.¹³ The gross plant of the nonretainable properties which are the subject of these orders aggregates over \$96,500,000.¹⁴ Although no court review was sought in three of these proceedings and the time therefor has long since expired, it may well be that review of the S. E. C.'s determinations will now be sought through the device of filing with the S. E. C. a dilatory petition for reopening. Even in the *Philadelphia Company* case, where there has already been court review, the opinion of the court below might sanction a reopening of the S. E. C. proceeding and additional review at this late

¹³ *Cities Service Company*, 17 S. E. C. 5, Holding Company Act Release No. 5350 (1944); *Eastern Utilities Associates*, 31 S. E. C. 329, Holding Company Act Release No. 9784 (1950); *Commonwealth & Southern Corporation*, 26 S. E. C. 464; *Philadelphia Company*, at 28 S. E. C. 35, aff'd *sub nom Philadelphia Co. v. S. E. C.*, 177 F. 2d 720 (C. A. D. C.).

¹⁴ The properties required to be divested and the amount of the gross plant of such properties as of December 31, 1955, as shown in reports filed by the registered holding companies with the S. E. C., are as follows:

Registered holding company system	Company whose properties are required to be divested	Gross plant
Cities Service Company	Dominion Natural Gas Co., Ltd.	\$23,134,715
Eastern Utilities Associates	Blackstone Valley Gas and Electric Co.	9,080,438
Commonwealth & Southern Corporation.	Georgia Power Co.	190,124
The Philadelphia Company*	Pittsburgh Railways Co.	64,179,243
		96,583,520

*Philadelphia Co. owns 50.89% of the common stock of Pittsburgh Railways Co.

date. It should be noted that in one of these cases, *Eastern Utilities Associates*, the problem of whether or not there would be a "loss of substantial economies" within the meaning of Clause (A) was specifically involved and it might now be urged that this should be reinterpreted in accordance with the substantive holdings below.

In addition, the S. E. C. has specifically reserved jurisdiction in other registered holding company systems over the question of the retainability, under the standards of § 11 (b) (1), of certain gas properties.¹⁵ In this very case, in its March 20, 1953, order involved here the Commission did not release its § 11 (b) (1) jurisdiction over the question as to whether the gas and transportation properties operated by New Orleans Public Service Inc., a sister company of Louisiana Power, are retainable by the Middle South system under the standards of § 11 (b) (1). (R. 102, 109).¹⁶ Further, there are situations in still other registered holding company systems, which have

¹⁵ *North American Company*, Holding Company Act Release No. 10320 (1950); *Union Electric Company of Missouri*, Holding Company Act Release No. 12262 (1953); *Columbia Gas & Electric Corporation*, 17 S. E. C. 494; *Standard Oil Company (New Jersey)*, 14 S. E. C. 342.

¹⁶ In this connection, the effect of the final sentence of the opinion of the court below is not clear. It states with respect to its remand to the S. E. C.:

"The further consideration to be given to this matter by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order."

Commonwealth & Southern Corporation, 26 S. E. C. 464; *Philadelphia Company*, at 28 S. E. C. 35, aff'd *sub nom Philadelphia Co. v. S. E. C.*, 177 F. 2d 720 (C. A. D. C.).

¹⁴ The properties required to be divested and the amount of the gross plant of such properties as of December 31, 1955, as shown in reports filed by the registered holding companies with the S. E. C., are as follows:

Registered holding company system	Company whose properties are required to be divested	Gross plant
Cities Service Company.....	Dominion Natural Gas Co., Ltd.....	\$23, 134, 715
Eastern Utilities Associates.....	Blackstone Valley Gas and Electric Co.	9, 089, 438
Commonwealth & Southern Corporation.	Georgia Power Co.....	190, 124
The Philadelphia Company*.....	Pittsburgh Railways Co.....	64, 179, 243
		96, 593, 520

*Philadelphia Co. owns 50.89% of the common stock of Pittsburgh Railways Co.

not yet had proceedings directed to them, where there appear to be § 11 (b) (1) problems.¹⁷

Prospectively, various situations might well occur which would give rise to problems not now existing under §§ 11 (b) (1) or 11 (b) (2) and as to which the procedural and, with respect to § 11 (b) (1), substantive interpretations of the court below would become applicable. For example, as to § 11 (b) (1), a registered holding company system having only electric properties might acquire the voting stock of a non-affiliated company which has both gas and electric properties,¹⁸ or it could be claimed that the registered system is extending its permissible operations beyond the area permitted by § 11 (b) (1).¹⁹ With respect to § 11 (b) (2), a registered holding company, which today meets the standards of that subsection, might acquire less than all of the outstanding stock of a public-utility company, requiring that action be taken

¹⁷ (a) *Delaware Power & Light Company* (system includes both gas and electric properties); (b) *New England Electric System* (system includes both gas and electric properties); (c) *Utah Power & Light Company* (system has non-interconnected electric properties).

¹⁸ The Commission could approve the acquisition of the stock on the ground the electric properties of the acquired company were integrated with the electric properties of the acquiring company, as required by § 10 (c) (2) of the Act, and reserve jurisdiction as to whether the gas properties satisfy the additional system test of § 11 (b) (1). Such a situation arose in *North American Company*, Holding Company Act Release No. 10320 (1950).

¹⁹ On September 18, 1956, Public Service Company of Indiana, Inc., petitioned the S. E. C. to order American Gas & Electric Company, a registered holding company, to cease the contemplated construction of a generating station in the service area of Public Service Company of Indiana, Inc.

under that subsection.²⁰ Or a company's financial situation can so deteriorate that it no longer meets the § 11 (b) (2) standards.²¹

In sum, the fact is that, even though the Public Utility Holding Company Act has been on the books for two decades, the procedural ruling below creates a real danger that a substantial amount of the work which has been done will now be challenged, thus imposing (at the least) a heavy burden and fostering further delay. The problem for future proceedings will also be great if the Commission and the parties are to avoid successive reopenings and to achieve the proper measure of finality under the Act.

²⁰ The Commission could approve the acquisition, reserving jurisdiction with respect to whether or not the creation of the minority interest brought about an undue complexity or an inequitable distribution of voting power contrary to the standards of § 11 (b) (2). This situation occurred in *Union Electric Company of Missouri*, Holding Company Act Release No. 12262 (1953). See also *Ohio Edison Company*, 30 S. E. C. 613, 622-623 (1949); *The Southern Company*, Holding Company Act Release No. 10055, pages 14-15 (1950); *American Gas and Electric Company*, Holding Company Act Release No. 10294, page 14 (1950); and *Central Louisiana Electric Company, Inc.*, Holding Company Act Release No. 10430, page 19 (1951). Cf. *Cities Service Company*, Holding Company Act Release No. 13254, page 22 (1956).

²¹ This occurred in the Long Island Lighting Company system, where the Commission in 1936 had granted it an exemption from the provisions of the Act pursuant to § 3 (a) (1) at a time when the system was in sound financial condition. *Long Island Lighting Co.*, 1 S. E. C. 345. Subsequently, in 1945, after substantial dividend arrearages had accumulated on the preferred stock of all the system companies, the Commission modified the exemption and specifically made the provisions of § 11 (b) (2) applicable. *Long Island Lighting Co.*, 18 S. E. C. 717. Thereafter, in 1948 the Commission issued an order pursuant to § 11 (b) (2) directing the elimination of the preferred stocks of the various system companies. *Long Island Lighting Co.*, 28 S. E. C. 482.

3. The determination of the court below as to reopening, if not reviewed by the Court at this time, will not again be reviewable in this proceeding. If the Court should deny certiorari, then the S. E. C. will be required, in view of the mandate of the Court of Appeals, to (a) reopen the proceeding, and (b) accept evidence as to the loss of economies to the principal system. Regardless of what decision the Commission makes in the reopened proceeding, the issues as to the meaning of the penultimate sentence of § 11 (b) will not again be in issue before the Court of Appeals. The proceeding will have been reopened pursuant to the court's order, and the question of reopening will therefore have dropped out of the case. And, as we point out below (*infra*, pp. 23), the substantive legal issues as to the bearing of "loss of substantial economies" will also, in effect, be mooted.

II

A. With respect to the 1953 determinations of the S. E. C. which the court below held substantively erroneous, the decision is in conflict with those of the Court of Appeals for the District of Columbia Circuit in *Philadelphia Co. v S. E. C.*, 177 F. 2d 720 (C. A. D. C.) and *Engineers Public Service Co. v. S. E. C.*, 138 F. 2d 936 (C. A. D. C.).²² These determinations involved the meaning of the phrase "without the loss of substantial economies" which is contained in Clause (A) of the proviso to § 11 (b) (1) (App. B. *infra*, p. 37).

²² Vacated as moot and remanded on stipulation. 332 U. S. 788.

§ 11 (b) (1), as this Court pointed out in *North American Co. v. S. E. C.*, 327 U. S. 686, 696-697, "in essence . . . confines the operations of each holding company system to a single integrated public utility system with provision for the retention of additional systems only if they are relatively small, located close to the single system *and unable to operate economically under separate management without the loss of substantial economies; . . .*" [emphasis added]. The italicized language refers to the condition, here involved, for retention of "additional integrated public-utility systems," *i. e.*: "(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system." In interpreting this language, it was pointed out in the *Engineers* case, 138 F. 2d at 944:

" . . . Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases."

In the *Philadelphia Co.* and *Engineers* cases, as in the instant one, the parties contended that the Commission had unduly limited the meaning of the phrase "loss of substantial economies" so as to preclude the retention of their gas properties as an additional system. The S. E. C. in all these cases had consistently defined the term "substantial economies" to

mean that they be of sufficient importance that their loss would cause a serious economic impairment of the system such as to render it incapable of independent economic operation. This definition was accepted by the Court of Appeals in the *Philadelphia Co.* and *Engineers* cases. It stated in the *Philadelphia Co.* case, 177 F. 2d at 725:

"In the Commission's view, economies are not 'substantial' unless their loss 'would cause a serious economic impairment of the system' such as to 'render it incapable of independent economical operation' . . . We cannot say the Commission's understanding of the term 'substantial economies' is wrong. We construed it similarly in the *Engineers* case."

The Commission's construction, as pointed out in *Philadelphia Co.*, is fully supported by the legislative history of the Act.²³

²³ See *Philadelphia Co. v. S. E. C.*, 177 F. 2d at 725, citing H. R. Rep. No. 1903, 74th Cong., 1st Sess. 71 (1935) and 79th Cong. Rec. 14,479 (August 24, 1935). The first cited authority, the Statement of the Managers on the Part of the House accompanying the Conference Report, states that Clause (A) was inserted to make a ". . . provision to meet the situation where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems" The other, a Statement by Senator Wheeler, Chairman of the Senate Committee on Interstate and Foreign Commerce, and in charge of the bill, states that the "furthest concession" from the general rule of limiting a holding company to one integrated system "would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems . . . were so small that they were incapable of independent economical operation"

In rejecting the interpretation of the S. E. C. and the Court of Appeals for the District of Columbia Circuit, the court below stated that this construction "is not one that is to be inflexibly used in the application of Clause A of the saving section" (App. A, *infra*, p. 34) but suggested no circumstances existing here which might account for the application of a different construction.

2. The court below also rejected the S. E. C.'s interpretation that the loss of substantial economies must relate only to the loss to the additional system sought to be retained and not to any loss of economies to the retainable principal integrated system (R. 97). This administrative construction is likewise supported by the legislative history²⁴ and appears to have been assumed by this Court. See the quotation at page 19, *supra*, from *North American Co. v. S. E. C.* 327 U. S. 686, 696-697. A specific holding that only losses to the additional system should be considered was also made by the S. E. C. in the *Philadelphia Co.* case, 28 S. E. C. 35, 52. In affirming the order in that case, the Court of Appeals for the District of Columbia Circuit presumably accepted this construction since, despite the fact that this question was fully briefed by the parties, the court in its rather extended opinion made no reference to the alleged savings to the principal system except to comment in a footnote that the company's witness "also testified" as to the amount that separation would increase the expense of the electric system (177 F. 2d at 724, n. 17). In the *Engineers* case also, the District of Columbia Circuit

²⁴ See footnote 23, *supra*.

appears to have applied this construction. The court pointed out (138 F. 2d at 944) that the question involved was "whether or not the facts as they were revealed at the hearing give reasonable support to the Commission's conclusion that 'substantial economies' would not be saved to 'Virginia Gas' by reason of 'Virginia Electric's' continued control of the former," and the court indicated that the substantial economies "must relate to the healthful continuing business and service of the freed utility" (emphasis added).

B. 1. The Fifth Circuit's substantive holdings, like its procedural ruling, will have a serious impact upon the Commission's administration of the Act. In future proceedings,²⁵ in order to comply with these holdings in § 11 (b) (1) proceedings where the retainability of additional systems is involved, as in the instant case, the S. E. C.'s staff will have to make detailed cost studies based upon figures derived from the companies' own records and therefore more accessible to the companies. Moreover, in such a case, the S. E. C. will have to accept and consider a type of evidence with respect to the standards of Clause (A) of § 11 (b) (1) which it has heretofore deemed and still deems irrelevant.²⁶ The administrative proceedings will necessarily be burdened and prolonged.

With respect to the past, the Fifth Circuit's ruling on reopening combines with its substantive holdings on "substantial economies" to create the potenti-

²⁵ See *supra*, pp. 13-17, for the potential future proceedings.

²⁶ See *supra*, pp. 12-13, for the strong possibilities of review of § 11 (b) cases in the Fifth Circuit.

ality of lengthy, detailed, and unsettling hearings involving large public-utility systems with enormous assets. See *supra*, pp. 11, 13-16.

2. Like the procedural issue (*supra*, p. 18), these substantive issues, if they are to be reviewed, should be reviewed at this stage. As to the meaning of Clause (A) of § 11 (b) (1), the S. E. C. will be required under the mandate of the court below to accept evidence as to the loss of economies to the principal system. If the Commission should determine that the evidence satisfies the standard of "loss of substantial economies" as interpreted below, it plainly could not seek review itself. If it should decide that the proffered evidence does not satisfy the standard of "loss of substantial economies" as interpreted below, the only question for review in that court would be whether there is substantial evidence to support the administrative determination, and it is not at all clear whether this Court would consider at that stage the question of the appropriate legal standard to be applied. It is in circumstances like these that the Court has indicated that it will review even an interlocutory decision which involves an issue "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U. S. 373, 377; *Land v. Dollar*, 330 U. S. 731, 734, fn. 2.

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the judgment of the court below.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

THOMAS G. MEEKER,
General Counsel,

DAVID FERBER,
Assistant General Counsel,

SOLOMON FREEDMAN,
Special Counsel,

JOSEPH B. GILDENHORN,
Attorney,
Securities and Exchange Commission.

SEPTEMBER 1956.

APPENDIX A

1. OPINION OF THE COURT OF APPEALS

In the United States Court of Appeals for the Fifth
Circuit

No. 15820

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER
versus

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

*Petition for Review of Order of the Securities and
Exchange Commission*

(June 30, 1956.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This is a petition to review an order of the Securities and Exchange Commission denying a petition to reopen and receive new evidence in proceedings which culminated in a Commission order of March 20, 1953, directing a public utility holding company and three of its subsidiaries to dispose of their direct and indirect ownership in certain non-electric properties. The Securities and Exchange Commission opposes the petition for review on the grounds that the denial of a petition to reopen proceedings is not a reviewable order under Section 24 (a) of the Public Utility Holding Company Act, 15, U. S. C. A. § 79x, and that, in any event, the petition to reopen was without merit.

The Securities and Exchange Commission issued an earlier order regarding these properties on March 7,

1949, when it approved a plan for the dissolution of the Electric Power & Light Corporation and the creation of Middle South Utilities, Inc., which acquired from the Electric Power & Light Corporation the latter's sole ownership of the Arkansas Power & Light Company, the Louisiana Power & Light Company, and the Mississippi Power & Light Company. It also acquired from the Electric Power & Light Corporation 95.2% of the common stock of New Orleans Public Service, Inc., and all of the securities of the Gentilly Development Company, a non-utility land company. The Securities and Exchange Commission, in approving the plan, reserved jurisdiction to make further findings under Section 11 of the Act, 15 U. S. C. A. § 79k, regarding the integrated character of the electric properties of Middle South's subsidiaries, and the retainability of non-electric properties by these companies.

Subsequent to this order, the Arkansas Power & Light Company and the Mississippi Power & Light Company disposed of nearly all their non-electric properties and thereafter engaged almost exclusively in electric operations. The Gentilly Development Company disposed of its land and had only cash as a major asset. The Louisiana Power & Light Company, however, retained both electric and gas properties, and New Orleans Public Service, Inc., continued to engage in electric, gas and transportation operations. In January, 1953, the Securities and Exchange Commission issued an order convening a hearing pursuant to Section 11 (b) (1) of the Act, 15 U. S. C. A. § 79k (b) (1), to decide, inter alia, whether Middle South Utilities, Inc., and the Louisiana Power & Light Company should be required to dispose of the gas utility and non-utility assets of the Louisiana Power & Light Company, and if so, upon what terms and con-

ditions. The named respondents were Middle South Utilities, Inc., the Arkansas Power & Light Company, the Mississippi Power & Light Company, and New Orleans Public Service, Inc. A copy of the order was served upon the petitioner here, the Louisiana Public Service Commission, by registered mail. However, the Louisiana Public Service Commission did not appear, nor did any other public body or group of public security holders appear with regard to the retainability of gas properties by the Louisiana Power & Light Company.

On March 20, 1953, the Securities and Exchange Commission issued its findings and order, which required Middle South Utilities, Inc., the Arkansas Power & Light Company, the Louisiana Power & Light Company, and the Mississippi Power & Light Company to dispose of their direct and indirect ownership in non-electric properties. New Orleans Public Service, Inc., was allowed to retain its gas and transportation properties along with its electric properties, in view of the strong desire of the City of New Orleans for New Orleans Public Service, Inc., to continue unified operations, and the special character of the franchise and regulatory system in that city.

Insofar as is pertinent here, the effect of the order was to require Middle South Utilities, Inc., the Arkansas Power & Light Company, the Louisiana Power & Light Company, and the Mississippi Power & Light Company to dispose of certain steam and water properties owned by the three subsidiaries. It likewise required Middle South Utilities, Inc. and the Louisiana Power & Light Company to divest themselves of the latter's gas properties.

No petition for review of this order was filed, and the Securities and Exchange Commission set March 20, 1955 as the deadline for compliance therewith by

Middle South Utilities, Inc. and the Louisiana Power & Light Company. On November 10, 1954, the Louisiana Power & Light Company and the Louisiana Gas Service Corporation filed a joint application-declaration with the Securities and Exchange Commission, proposing that the newly incorporated Louisiana Gas Service Corporation acquire all the non-electric properties of the Louisiana Power & Light Company. The Louisiana Power & Light Company was to own all the common stock of the Louisiana Gas Service Corporation. Thereafter the petitioner here, the Louisiana Public Service Commission, requested a public hearing on the matter and also asked that the Securities and Exchange Commission reopen the record in the proceeding which had resulted in the divestment order. Upon the suggestion of the Securities and Exchange Commission, petitioner filed a detailed offer of proof and a brief in support of its request. After oral argument, the Commission, by order of September 19, 1955, denied the Louisiana Public Service Commission's request that the prior proceeding be reopened. The Louisiana Public Service Commission here challenges the legality of this order.¹

We think the order of September 19 is reviewable. The order here involved is not of the type dealt with in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*,

¹ The Louisiana Power & Light Company intervened in this court, reiterating the arguments of the Louisiana Public Service Commission. Middle South Utilities, Inc. also intervened, stating that it was in accord with the views expressed by the petitioner and the Louisiana Power & Light Company, but strongly opposing a reopening of the record which would result in reconsideration of the status of the entire Middle South system; in effect, it desired a reconsideration only of that part of the Securities and Exchange Commission's divestment order which required the Louisiana Power & Light Company and itself to dispose of the Louisiana Power & Light Company's gas properties.

300 U. S. 131, but is an order based on a procedure specifically authorized by § 79k (b) of the statute.³ This provision was availed of by the petitioner here by requesting that the record be reopened. The fact that the Securities and Exchange Commission considered the petition, suggested that petitioner file an offer of proof, considered the proof thus offered, and made a specific finding that "no grounds for questioning our earlier conclusion . . . have been indicated" demonstrates that the Commission considered this procedure as a petition to modify the earlier order. The order denying this request is expressly reviewable.⁴

The Commission contends that the power to revoke or modify upon a finding that the conditions upon which the order was predicated *do* not exist comes into play only if a change in conditions has occurred after the entry of the earlier order.⁴ The action of the Securities and Exchange Commission here indicates that it considered that it had the duty to consider the proof that related to the conditions that existed as of the time the earlier order was entered. The language of the statute does not precisely state whether the utility can ask for a modification of the

³ With regard to § 11 (b) proceedings, the Act provides: "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 79x of this title." 15 U. S. C. A. § 79k (b).

⁴ See last sentence of section 79k (b), f. n. 2, *supra*.

⁴ Extensive authority for this proposition is cited in the nature of orders by the Securities and Exchange Commission. No court decision is cited to support this construction. The language of the court's opinion in *American Power Co. v. S. E. C.*, 329 U. S. 90, at p. 121, seems to indicate to the contrary.

earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order. The language is susceptible of the construction, however, that if, in fact, it can be shown that the conditions on which the order was predicated were not truly the actual conditions, then a modification may be sought and obtained. We hold that such modification may be based on the facts as they existed at the time of the order which is to be modified.

A review of action by the Securities and Exchange Commission denying such modification is, as we have noted, expressly provided for. Such review is thus not circumscribed by the rules applying to review of discretionary acts. In passing on any petition for revocation or modification, as provided for in § 79k (b) the normal standards by which an administrative tribunal arrives at its decision would, of course, apply. There must be a basis in fact for the decision and the facts must be applied in accordance with the proper rules of law.

Petitioner here contends that these standards were not met because, so it contends, the Commission misconstrued § 79k (b) (1)⁵ in holding that the only company whose loss of substantial economies was to be considered was the projected gas company; that the loss of substantial economies to the parent Louisiana

⁵ This section provides that the Commission *shall* "permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

A. Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system."

Power & Light Company resulting from the severance is not to be considered. The respondent agrees that such is its position. It says that it has consistently construed this section in the challenged manner. The Securities and Exchange Commission says in its brief that "The meaning of this clause is clear from the legislative history and from Securities and Exchange Commission and court decisions." In support of its position it quotes from the statement of the managers on the part of the House accompanying the Conference Report⁶ and a statement made by a Senator on the floor of the Senate *after* the passage of the bill, but before the President had signed it.⁷ It also cited Philadelphia Company et al, 28 S. E. C. 35, 52, and General Public Utility Corporation, Holding Company Act Release No. 10982, as its prior decisions on the point, and cited *Philadelphia Company v. S. E. C.* (D. C. Cir.), 177 F. 2d 720, 724, 725, as accepting without discussion the Securities and Exchange Commission's views on the matter.

We think that the language of a statute should be construed, if possible, by taking the usual intentment of the words without reference to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear.

Giving to the language of § 79k (b) the meaning normally attributed to the words used, we think it

⁶ This clause was inserted for the first time by the Conference Committee. This statement, as quoted in respondent's brief, was that it was a "... provision to meet the situation when a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems. . . ."

⁷ This statement made by Senator Wheeler, quoted by the respondent's brief, was that the effect of the clause "would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems . . . were incapable of economic operation"

quite clear that if, in fact, there is a loss of substantial economies either to the separated utility or to the parent company, then the proviso in clause A is satisfied, for in such event it is clear that "each of such additional systems [here the gas system] cannot be operated without the loss of substantial economies [to the parent company] which can be secured by the retention of control by such holding company of such system." Since the term "loss of substantial economies" is not expressly restricted in the statute to the economies relating to the operation of the additional companies, but is in terms broad enough to include the loss of substantial economies to the holding company as well, it would require judicial legislation for the court to cut it down as contended for by the Securities and Exchange Commission.

Neither the legislative history, if we are to consider that, nor the one court decision, relied on by the respondent, discussed this precise point. We cannot permit our conclusion as to the correct construction of the Act to be overborne by discussion by another court of other features of the Act from which a contrary construction can at most only be inferred. This is too important a part of the section to be interpreted by such method. Furthermore, while we recognize the merit of respondent's contention that the interpretation placed on a law by the agency enforcing it is persuasive, no one will contend that it is not, after all, the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy.

We do not make any findings here contrary to those arrived at by the Securities and Exchange Commission. We do decide that in making its findings on the crucial question of loss of substantial economies the Securities and Exchange Commission refused to

give weight to important facts which, if as alleged by petitioner, would have presented an entirely different picture.*

There remains the question as to what is meant by the language "substantial economies." The Commission contends that economies are not substantial unless their loss "would cause a serious economic impairment of the system" such as "to render it incapable of independent economical operation." It cites *Engineers Public Service Co. v. S. E. C.* (D. C. Cir.), 138 F. 2d 936, and *Philadelphia Co. v. S. E. C.* (D. C. Cir.), 177 F. 2d 720, as supporting this proposition. We think neither case accepts the contention of the Securities and Exchange Commission that the words "substantial economies" must be so construed. The *Engineers Public Service Co.* case says "substantial economies must mean, as was said in *North American Company v. S. E. C.* (2 Cir.); 133 F. 2d 148, 152, 'important economies.'" To be sure there was a dissent in which Judge Soper, who wrote the opinion, favored a reversal of the order of the Securities and Exchange Commission because he thought the undisputed facts constituted a showing of "substantial economies." The majority merely felt that the evidence was not conclusive, and therefore declined to reverse the finding of the Commission. There was no specific holding by the court that the Commission's formula as to what was meant by "substantial economies" was universally applicable. Much the same is true of the later decision in the *Philadelphia Company* case. There the court affirmed an order of the Securities and Exchange Commission, in

* The offer of proof included detailed computations showing anticipated losses of \$684,377 of economies to the electric Company following the dismemberment, which, when added to computed losses of \$272,816 to the gas utility, constituted a sizeable, if not a substantial, figure.

which its limiting formula had been applied. The court there said "'substantial' is a relative and elastic term." In the context of the particular case, the court then said: "We cannot find the Commission's understanding of the term 'substantial economies' is wrong."

We are convinced that the formula proposed by the Commission is not one that is to be inflexibly used in the application of clause A of the saving section. We think, as has been said by the Court of Appeals for the Second Circuit in *North American Company v. S. E. C.* (2 Cir.), 133 F. 2d 148, 152, and as stated in the *Engineers Public Service Company* case, *supra*, that the term "substantial economies" means important economies. The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses.*

Finding as we do that the Commission excluded from its consideration what, if any, economies might be lost to Louisiana Power and Electric Company in its application of Clause A, and finding as we do that the commission's concept as to what constituted "substantial economies" was too rigid, it becomes necessary for us to grant the relief requested by the petitioner and remand this proceeding to the Securities and Exchange Commission for its further consideration in the light of this opinion.

An intervention has been filed in this case by Middle South Utilities, Inc., in which the intervenor strenuously objects to any action here that would cause or authorize the reopening by the Securities and Ex-

* See *Engineers Public Service Co. v. S. E. C.* (D. C. Cir.), 138 F. 2d 936, 944.

change Commission of the order, of March 20, 1953, as relates to the Middle South system as a whole. The further consideration to be given to this matter by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order.

2. JUDGMENT

Extract from the Minutes of June 30, 1956

No. 15820

LOUISIANA PUBLIC SERVICE COMMISSION

versus

SECURITIES AND EXCHANGE COMMISSION

This cause came on to be heard on the petition of Louisiana Public Service Commission for a review of an order of the Securities and Exchange Commission dated September 13, 1955, "IN THE MATTER OF MIDDLE SOUTH UTILITIES, INC., ARKANSAS POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, NEW ORLEANS PUBLIC SERVICE, INC., Respondents, File No. 59-100; ELECTRIC POWER & LIGHT CORPORATION, File No. 54-139; LOUISIANA POWER & LIGHT COMPANY, File No. 61-620. (Public Utility Holding Company Act of 1935)", and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; and that this cause be, and it is hereby, remanded to the Securities and Exchange Commission for its further consideration in the light of the opinion of this Court.

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APPENDIX B

Pertinent provisions of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79 *et seq.*, 49 Stat. 804) are as follows:

Section 2 (a) (29) (15 U. S. C. § 79b (a) (29); 49 Stat. 810):

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(29) "Integrated public-utility system" means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection, and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a

single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and effectiveness of regulation: *Provided*, That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

Section 11 (b) (15 U. S. C. § 79k (b); 49 Stat. 820):

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however*, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems

are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall

cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

Section 24 (a) (15 U. S. C. § 79x (a) ; 49 Sta . 834) :

Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall

have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE
SOUTH UTILITIES, INC., AND LOUISIANA POWER &
LIGHT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

1. Respondent Louisiana Commission has stated in its first question to this Court (Louisiana Commission Br. p. 2) that the procedural issue presented is whether a Court of Appeals may review an order of the Commission declining to revoke or modify an earlier order on a showing that conditions as of the date of the original order, "*or subsequent thereto*, upon which the order was predicated do not exist." [Emphasis added.] The fact is, however, that the court below did not base its decision on *subsequent* changes of condition which the Commission concedes

might constitute a basis for reopening, but relied solely on an allegation that the conditions were otherwise than shown by the record before the Commission at the time it issued its original order. Moreover, the additional procedural issue of whether the Court of Appeals can review legal determinations made in connection with the original order, upon its review of an order of the Commission denying a petition to reopen, has not been included by the respondent, although it is an integral part of this case.

2. In urging the lack of conflict between the decision below and that of the Court of Appeals for the District of Columbia Circuit in *Engineers Public Service Co. v. S. E. C.*, 138 F. 2d 936 and *Philadelphia Co. v. S. E. C.*, 177 F. 2d 720, the Louisiana Commission states: "The Court will look in vain in the *Engineers* decision for language to support the S. E. C. view that the loss must cause a serious economic impairment of the system such as to render it incapable of independent economical operation" (Louisiana Commission Br. p. 13). But surely the Court of Appeals for the District of Columbia Circuit is the best judge of the test it applied in that decision, and it pointed out in the *Philadelphia* case, in connection with its agreement with the Commission's interpretation of the term "substantial economies", that "We construed it similarly in the *Engineers* case" (177 F. 2d at 725).

The Louisiana Commission also urges that the *Engineers* case is not in conflict with the ruling below on the question of whether loss of economies to the principal system might be considered. To support this contention, respondent quotes from the language of the court to the effect that the Commission could not legally permit the continued control of "Virginia Gas" by "Virginia Electric" unless it could be found that "such continuing strength would not entail a sacrifice upon the part of the controlling utility" (Louisiana Commission Br. p. 14). Respondent apparently construes this language to mean that a loss of substantial economies which might be occasioned by divestment must be considered in relation to the principal system, as a factor in deciding whether the additional system should be retained. But a close analysis of the language of the opinion—which is phrased in double-negative form—indicates that respondent's interpretation is incorrect and that the court stated merely that *a controlled system must be divested* when its retention would result in "a sacrifice upon the part of the controlling utility." The quoted language, as construed by respondent, would be wholly inconsistent with the statement on the same page of the opinion that the substantial economies

“must relate to the healthful continuing business and service of the *freed* utility.” [138 F. 2d at 944; emphasis added.]

Respectfully submitted,

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

THOMAS G. MEEKER,
General Counsel,

DAVID FERBER,
Assistant General Counsel,

SOLOMON FREEDMAN,
Special Counsel,

JOSEPH B. GILDENHORN,
Attorney,
Securities and Exchange Commission,
Washington 25, D. C.

NOVEMBER 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

**LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH
UTILITIES, INC., AND LOUISIANA POWER & LIGHT
COMPANY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 134) is reported at 235 F. 2d 167. The findings and opinion of the Securities and Exchange Commission dated September 13, 1955 (R. 129), are unreported, as are the findings and opinion of the Commission dated March 20, 1953 (R. 103).

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (R. 143). The petition for a writ of certiorari was filed on September 28, 1956, and

was granted on December 3, 1956 (R. 144). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. (a). Whether Section 11 (b) of the Public Utility Holding Company Act of 1935—which authorizes the Securities and Exchange Commission, upon a showing that “the conditions upon which the order was predicated do not exist,” to revoke or modify any final order previously entered under Section 11 (b)—relates to a situation where there has been no change in conditions since the entry of the original order.

(b). If so, whether legal determinations made in connection with the original order become reviewable on review of a Commission order denying a petition to reopen the former proceeding.

2. (a). Whether Section 11 (b) (1) (A)—which makes the “loss of substantial economies” a prerequisite to retention by a registered holding company of “additional systems”—relates to the loss to be incurred by the principal system as well as by the “additional systems” sought to be retained.

(b). Whether the required “loss of substantial economies” must cause such a serious economic impairment to the systems involved as to render them incapable of independent economic operation.

STATUTE INVOLVED

Sections 11 (b) (1) and 24 (a) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 820, 834, 15 U. S. C. 79k (b) and 79x (a), are set forth in the Appendix, *infra*, pp. 49–51.

STATEMENT

This Court has previously had occasion to consider questions under the Public Utility Holding Company Act of 1935 ("the Act") relating to holding company systems of which the respondent, Louisiana Power & Light Company ("Louisiana Power"), was a part. Louisiana Power and its sister companies, Arkansas Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc., were all public-utility subsidiaries of Electric Power & Light Corporation, one of the five subholding companies in the Electric Bond and Share Company holding company system. In 1938, in *Electric Bond and Share Company v. Securities and Exchange Commission*, 303 U. S. 419, this Court determined that the registration provisions of the Act were constitutional and that Electric Bond and Share Company must register thereunder. Thereafter, the Securities and Exchange Commission instituted proceedings under Section 11 (b) of the Act against Electric Bond and Share Company and certain of its subsidiaries, as a consequence of which an order was entered in 1942, directing the dissolution of certain of the subholding companies of the Electric Bond and Share system, including Electric Power & Light Corporation. The Securities and Exchange Commission's dissolution order was upheld by this Court in 1946 in *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, sustaining the constitutionality of the provisions of Section 11 (b) (2) of the Act.

On March 1, 1949, pursuant to Section 11 (e) of the Act, the S. E. C. approved a plan for the dissolution of Electric Power & Light Corporation¹ In connection with that plan, the S. E. C. approved the creation of Middle South Utilities, Inc. ("Middle South"), a respondent herein, as a holding company to take over certain of Electric Power & Light Corporation's holdings, including those of respondent, Louisiana Power, and the other three public-utility companies mentioned above. At the same time, the S. E. C. reserved jurisdiction to conduct such further proceedings under Section 11 (b) (1) (Appendix, *infra*, pp. 49-50) in respect of the Middle South holding company system and its several subsidiaries as might be necessary or appropriate.²

Each of Middle South's four subsidiaries at that time owned and operated electric utility assets and gas utility assets. In addition, certain of them owned and operated non-utility assets. Subsequent to Middle South's organization and prior to January 29, 1953, Arkansas Power & Light Company disposed of its transportation and gas assets,³ and Mississippi Power & Light Company disposed of its gas assets.⁴ Louisiana Power continued to operate electric, gas, and water assets, and New Orleans Public Service,

¹ *Electric Power & Light Corporation*, 29 S. E. C. 52.

² *Electric Power & Light Corporation*, Holding Company Act Release No. 8906 (1949).

³ *Middle South Utilities, Inc.*, 32 S. E. C. 1 (gas properties); *Arkansas Power & Light Company*, Holding Company Act Release No. 10300 (1950) (transportation properties).

⁴ *Mississippi Power & Light Company*, 33 S. E. C. 13.

Inc., continued, and still continues, to operate electric, gas, and transportation assets.

On January 29, 1953, pursuant to Section 11 (b) (1) and other sections of the Act, the S. E. C. issued a notice and order for hearing directed *inter alia* to Middle South and Louisiana Power.^{*} Among the issues enumerated as being the subject matter of the hearing was the following: "Whether Middle South and Louisiana [Power] should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana [Power] and, if so, what terms and conditions should be imposed in connection therewith." A copy of this notice and order for hearing was served upon the Louisiana Public Service Commission ("Louisiana Commission"), the petitioner below and a respondent in this Court, by registered mail (R. 136). A full hearing was conducted by the S. E. C. at which Middle South and Louisiana Power appeared, adduced evidence, and presented arguments to support the position that Middle South and Louisiana Power might retain Louisiana Power's gas properties as an additional integrated public-utility system within the proviso to Section 11 (b) (1). Although apprised of the hearing, the respondent Louisiana Commission failed to appear.

On March 20, 1953, the S. E. C. issued its findings and opinion, and ordered *inter alia* that Middle South and Louisiana Power divest themselves of all the non-

^{*} *Middle South Utilities, Inc.*, Holding Company Act Release No. 11687 (1953).

electric assets of Louisiana Power.* The S. E. C. concluded that Middle South and Louisiana Power had failed to establish that separation of the gas assets held by Louisiana Power would result in the "loss of substantial economies", as required by Clause (A) of Section 11 (b) (1) to justify the retention of those gas assets along with the electric assets of the Middle South System. The S. E. C.'s order, among other things, directed (R. 128) " * * * Middle South and its subsidiaries [to] dispose or cause the disposition of their direct and indirect ownership in the non-electric properties owned by * * * Louisiana [Power] * * * in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder * * * "

No petition to review the March 20, 1953, order was filed within the 60-day period provided by Section 24 (a) of the Act (Appendix, *infra*, pp. 50-51).

Thereafter, pursuant to Section 11 (c) of the Act, the S. E. C. extended until March 20, 1955, the period of time within which Middle South and Louisiana Power might comply with the March 20, 1953, directive.⁷ On November 10, 1954, Louisiana Power and Louisiana Gas Service Corp. ("Louisiana Gas"), a newly organized wholly-owned subsidiary of Louisiana Power, filed a joint application-declaration with the S. E. C. proposing, among other things, the transfer

* *Middle South Utilities, Inc.*, Holding Company Act Release No. 11782 (1953) (R. 103).

⁷ *Middle South Utilities, Inc.*, Holding Company Act Release No. 12475 (1954).

by Louisiana Power to Louisiana Gas of all the non-electric properties of Louisiana Power as a step in compliance with the divestment order (R. 136-137). The application-declaration stated that, while no definitive program for the ultimate divestment had at that time been developed, it was the intention of Louisiana Power to effect the divestment of the common stock of Louisiana Gas within a period of 18 months from the date Louisiana Gas was to begin operations.

After the filing of this application-declaration, respondent Louisiana Commission for the first time exhibited an interest in the S. E. C.'s Section 11 (b) (1) proceeding relating to the Middle South holding company system. In response to a notice^{*} issued by the S. E. C. advising that interested persons could request a hearing on the application-declaration filed by Louisiana Power and Louisiana Gas, the Louisiana Commission by telegram dated December 22, 1954, requested a public hearing in this matter, and in addition, asked that the S. E. C. open the record in the Section 11 (b) (1) proceeding which had resulted in the divestment order of March 20, 1953 (R. 89). Thereafter, the Louisiana Commission filed with the S. E. C. a petition (R. 90) and a supplemental petition (R. 92). Additionally, at the suggestion of the S. E. C., it submitted an offer of proof (R. 1) together with a brief (R. 49), in support of its request to open the record. The evidence proffered

^{*} *Louisiana Power & Light Company, Holding Company Act*
Release No. 12740 (1954).

did not purport to show that conditions had so changed since the entry of the March 20, 1953, order as to require a modification thereof. Rather, the offer of proof purported to establish that the evidence adduced at the hearing in 1953 by respondents Louisiana Power and Middle South, pertaining to the loss of economies which would result from separation of the gas properties, was incomplete (R.5). The Louisiana Commission also attacked the S. E. C.'s legal interpretation of the phrase "loss of substantial economies" made in connection with the entry of the 1953 order (R. 6-10, 56).

After receipt of this offer of proof, the S. E. C. published a notice with respect to the Louisiana Commission's request (R. 96),⁹ heard oral argument thereon, and by order of September 13, 1955, denied the request to reopen (R. 133).¹⁰ In holding that there was no basis for reopening the earlier proceeding, the S. E. C. emphasized in its findings that there were "no grounds for questioning * * * [its] earlier conclusion and no changed circumstances justifying a modification" of the 1953 order (R. 132).

The Louisiana Commission then filed its petition in the court below to review this order of September 13, 1955, and also stated that it sought review of the S. E. C.'s earlier order of March 20, 1953 (R. 63). Subsequently, the S. E. C. filed a motion, never acted upon by the court below, to dismiss the petition for

⁹ *Middle South Utilities, Inc.*, Holding Company Act Release No. 12892 (1955).

¹⁰ *Middle South Utilities, Inc.*, Holding Company Act Release No. 12978 (1955).

review on the ground that it was in essence an attempt to appeal from an order as to which the time for appeal had long since expired.

The court below set aside the S. E. C.'s order denying the request to reopen the proceeding and also held that legal determinations made by the S. E. C. in its 1953 decision were erroneous (R. 134-143). Specifically, the court found that the S. E. C., in refusing to reopen the earlier proceeding, had misinterpreted the penultimate sentence in Section 11 (b), providing that the S. E. C. might revoke or modify a previous order entered under that subsection if "it finds that the conditions upon which the order was predicated do not exist." Under the court's interpretation, the S. E. C. is required to reopen an earlier divestment order, even where there has been no change in conditions after the entry of the original order, if it can be shown that "the conditions on which the order was predicated were not truly the actual conditions" (R. 138). The court did not itself find that "the conditions on which the order was predicated were not truly the actual conditions," but concluded that the S. E. C. had erred in failing to consider the Louisiana Commission's offer of proof, "which, if as alleged by [the Louisiana Commission], would have presented an entirely different picture" (R. 138, 141).

With respect to the legal determinations in the 1953 proceeding, the court held that the S. E. C. had misinterpreted Clause (A) of Section 11 (b) (1) in two respects: first, in holding that the phrase "loss of substantial economies" should be interpreted to mean a loss only to the additional integrated public-

utility systems sought to be retained, without considering whether there is a loss to the principal integrated public-utility system as well (R. 139-141); and second, in holding that a loss is not "substantial" within the meaning of the statute if it would not cause "a serious economic impairment of the system" sought to be retained, such as to render it incapable of independent economical operation (R. 141-142).

The court remanded the proceeding to the S. E. C. for its consideration in light of the court's interpretation of the Act."

SUMMARY OF ARGUMENT

I

By petitioning the S. E. C. to reopen a concluded Section 11 (b) (1) proceeding and appealing from the denial of the petition, the respondent Louisiana Commission has obtained review in the court below of the S. E. C.'s original order long after the time to seek review of that order had expired. This extraordinary result stemmed from a combination of erroneous interpretations by the court below of the language of Section 11 (b).

The court first relied upon statutory language permitting the S. E. C. to revoke or modify a previous Section 11 (b) order "if, after notice and oppor-

¹¹ It directed that further consideration by the S. E. C. be "restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system" and that the court's opinion was not to "be taken to authorize a reconsideration of any other features of the March 20, 1953 order" (R. 142).

tunity for hearing, it finds that the conditions upon which the order was predicated do not exist." The consistent administrative interpretation of this clause, which is in accord with what appears to have been the construction of the clause by this Court and other courts which have referred to it, is that it authorizes modification or revocation only in the light of changed circumstances—that the clause, in other words, was merely designed to make clear that Section 11 (b) orders, although final and binding, might nevertheless be modified in the discretion of the S. E. C. where such action is warranted by subsequent events. The court below determined, however, that the clause authorizes modification where the facts before the S. E. C. at the earlier hearing did not "truly" reflect "the actual conditions" existing at the time of the entry of the earlier order. This unusual construction is not compelled by the statutory language and is wholly inconsistent with the statutory direction to the S. E. C. to provide "as soon as practicable" for compliance by holding company systems with the standards of Section 11 (b). It is also inconsistent with the judicial review provisions of the statute, which limit the time to review Section 11 (b) orders to 60 days after entry. In addition, when additional evidence is sought to be taken in connection with such review, the statute requires a showing of "reasonable grounds for failure to adduce" such evidence earlier—a test that the Louisiana Commission probably could not have met in this case, judging from

its inconsistent statements as to the reasons for its failure to appear earlier before the S. E. C.

In any event, even apart from the consistent administrative construction of the clause, the court below erred as to the availability and scope of review at this stage. Relying upon a statutory provision making Section 11 (b) orders directly reviewable, the court assumed that the 1955 order denying reopening of the previous proceeding was not only reviewable but also permitted the court to consider and reverse legal determinations made by the S. E. C. in its 1953 order. Since there is no specific provision in the Act for an order denying a petition for modification, it is doubtful whether any review of such action was intended. But even if review in some instances might be available from the denial of a petition for modification, the denial must nevertheless be non-reviewable where the petition does not allege a subsequent change in circumstances, since in essence the petition in this situation is merely a petition for rehearing, the denial of which is clearly non-reviewable. Moreover, even if some review of the S. E. C.'s 1955 action might have been appropriate, the court erred in holding that its review was "not circumscribed by the rules applying to review of discretionary acts." Such rules are applicable here, for the S. E. C.'s statutory power to modify a previous Section 11 (b) order is phrased in discretionary language. In this connection, it is clear that the S. E. C. properly exercised its discretion in refusing to reopen the proceeding at the instance of a party which had been duly

notified of the original proceeding but had taken no part therein and whose offer of proof did not indicate that the S. E. C.'s original factual conclusions were incorrect.

If this Court should conclude, in accord with the S. E. C.'s construction, that Section 11 (b) authorizes modification of a prior order only in changed circumstances, or that in any event the court below erred as to the availability or scope of judicial review, a reversal is required and this Court need not consider the issues (discussed *infra* under Point II) dealing with the correctness of the S. E. C.'s substantive legal determinations in the earlier proceeding culminating in the 1953 order.

II

As an exception to the policy of Section 11 (b) (1) of limiting a holding company system to a "single integrated public-utility system," retention of additional systems is permitted if they meet certain conditions, including the requirement that "Each of such additional systems cannot be operated as an independent system without *the loss of substantial economies* which can be secured by the retention of control by such holding company of such system" (emphasis added). The S. E. C., partly in reliance upon the legislative history of the Act, has consistently interpreted this provision to refer only to the potential loss which would be suffered by the additional systems (as distinguished from the principal system) and, moreover, has taken the position that the loss must be substantial enough to cause such a serious economic

impairment as would preclude the additional systems from operating economically under separate ownership. The Court of Appeals for the District of Columbia Circuit has specifically approved these tests. The court below, however, held that the "loss of substantial economies" relates to the principal system as well as to the additional systems, and that the word "substantial" means something less than the S. E. C.'s criterion. The court completely disregarded the legislative history on the ground that the statutory language was clear. However, that language, on its face, appears to be more consistent with the construction of the S. E. C. and of the Court of Appeals for the District of Columbia Circuit than that of the court below.

ARGUMENT

INTRODUCTION

In the Public Utility Holding Company Act of 1935, Congress determined that "the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected" by reason of enumerated abuses, resulting from the unregulated use of the holding company device in the aggregation of large gas and electric enterprises (Section 1 (b)). By reason of the persistent and wide-spread nature of these abuses—including "the growth and extension of holding companies" which bear "no relation to economy

of management and operation or the integration and coordination of related operating properties" (Section 1 (b) (4))—Congress concluded that it was necessary to "compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided" (Section 1 (c)).

In accordance with this policy, Section 11, recognized by this Court as the "very heart of the title,"¹² was designed to produce the orderly elimination of unnecessary holding companies and the integration and simplification of the holding company systems permitted to continue. Section 11 (b) sets forth the specific statutory standards with which holding company systems must conform, and provides that the S. E. C., "as soon as practicable after January 1, 1938," shall "require by order, after notice and opportunity for hearing", such action as it finds necessary to bring about conformity with these standards. Other subsections of Section 11 prescribe procedures whereby orders entered pursuant to Section 11 (b) are effectuated through fair and equitable plans which must be approved by the Commission. See Sections 11 (d) and 11 (e). The basic directive, however, is the S. E. C. order entered pursuant to Section 11 (b).

¹² See *North American Company v. Securities and Exchange Commission*, 327 U. S. 686, 704, n. 14, where this language was quoted from S. Rep. 621, 74th Cong., 1st Sess., p. 11.

As noted in *Commonwealth & Southern Corp. v. Securities and Exchange Commission*, 134 F. 2d 747, 751 (C. A. 3): "The orders to be entered by the Commission under section 11 (b) are fundamentally directions that the companies involved achieve a stated result in integration of operations, divestment of non-integrated properties, simplification of corporate structure or distribution of voting power in order to meet the standards established by the section."

Section 11 (b) orders are specifically made reviewable by the last sentence of that subsection in accordance with the general review provisions of Section 24 of the Act. Section 24 (a) (Appendix, *infra*, pp. 50-51) authorizes review in a court of appeals by the filing of a petition within sixty days after the entry of an order of the Commission, and subsection (b) provides that the commencement of such review shall not automatically operate as a stay. Under Section 11 (c), orders under Section 11 (b) are required to be complied with within one year, but upon a proper showing the Commission is authorized to grant an additional year. Congress also provided that a Section 11 (b) order might be revoked or modified by the Commission "if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

The order of March 20, 1953, which respondent Louisiana Commission sought to have reconsidered by the S. E. C., was a direction to the respondents Middle South and Louisiana Power to divest their non-electric assets pursuant to Section 11 (b) (1) (Appendix, *infra*, pp. 49-50)—the subsection adopted

to compel holding companies "to integrate and coordinate their systems and to divest themselves of security holdings of geographically and economically unrelated properties."¹³ Under Section 11 (b) (1), a holding company must normally limit its operations to a "single integrated public-utility system," but additional systems may be retained if they are found to meet certain qualifications, including the qualification set forth in Clause (A) here at issue that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system."

I

WHERE A PROCEEDING UNDER SECTION 11 (b) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 HAS BEEN CONCLUDED, AND NO TIMELY DIRECT REVIEW OF THE ORDER OF THE SECURITIES AND EXCHANGE COMMISSION HAS BEEN SOUGHT, AND THERE IS NO SHOWING OF A CHANGE IN THE CIRCUMSTANCES EXISTING AT THE TIME OF THE ORDER, THE ORDER IS NOT OPEN TO SUBSEQUENT ATTACK ON JUDICIAL REVIEW OF THE COMMISSION'S DENIAL OF A PETITION TO REOPEN THE CONCLUDED PROCEEDING

Through the device of appealing from an order denying a petition to reopen, respondent Louisiana Commission obtained in the court below a review of a Section 11 (b) order which was no longer subject to direct review since the time for appeal had expired more than two years earlier. We shall demonstrate

¹³ *North American Co. v. Securities and Exchange Commission*, fn. 12, *supra*, 327 U. S. at 704.

that, in permitting this collateral attack upon a "final and binding" directive of the S. E. C., the court below adopted a strained statutory construction which is wholly at odds with the aim of Congress to have compliance with Section 11 (b) effected "as soon as practicable."¹⁵

As authority for its action, the court below relied upon the last two sentences of Section 11 (b), which provide that:

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

The first of these sentences has been consistently interpreted by the S. E. C. as permitting modification or revocation of Section 11 (b) orders only "in the light of changed circumstances" since the order was issued.¹⁶ The court below, while apparently not ex-

¹⁴ *Commonwealth & Southern Corp. v. Securities and Exchange Commission*, 134 F. 2d 747, 751 (C. A. 3). Cf. *Skowhegan Savings Bank v. Securities and Exchange Commission*, 201 F. 2d 702, 705 (C. A. D. C.); *In re, Community Gas & Power Co.*, 168 F. 2d 740, 744 (C. A. 3), certiorari denied, 334 U. S. 846; *New York Trust Co. v. Securities and Exchange Commission*, 131 F. 2d 274, 275 (C. A. 2), certiorari denied, 318 U. S. 786.

¹⁵ See Sections 1 (c) and 11 (b) of the Act.

¹⁶ *Community Gas and Power Company*, 15 S. E. C. 492, 500; *West Texas Utilities Company*, 21 S. E. C. 566; *The Middle West Corporation et al.*, 22 S. E. C. 87; *The North American Company*, 28 S. E. C. 742, 747-760; *International Hydro-Electric System*, 30 S. E. C. 631; *International Hydro-Electric Sys-*

cluding the propriety of modification on the basis of changed circumstances, interpreted the statutory language also to permit modification where "it can be shown that the conditions on which the order was predicated were not truly the actual conditions," or, otherwise stated, that modification might "be based on the facts as they existed at the time of the order which is to be modified" (R. 138).

The second of the statutory sentences quoted above makes clear that Section 11 (b) orders are directly reviewable pursuant to the general provisions for review contained in Section 24, under which the time for filing a petition for review is limited to 60 days. The S. E. C.'s position is that, once the sixty-day period has elapsed without any petition for review having been filed, the order is no longer subject to challenge by an attack upon the conditions found to have existed when the order was entered. The court below held, however, that this sentence authorizing review of Section 11 (b) directives permitted it, on review of an S. E. C. order, refusing to reopen an earlier proceeding, to require the S. E. C. to consider matters which could have been, but were not, presented in the earlier proceeding, and to apply legal standards different from those which it had previously applied.

tem, Holding Company Act. Release Nos. 13044, pp. 10-14 (1955), enforced, D. C. Mass., Civil Doc. No. 2430 (unreported), affirmed *sub. nom. Equity Corp. v. Brickley*, 237 F. 2d 839 (C. A. 1), certiorari denied, 352 U. S. 989; *Standard Power and Light Corp.*, Holding Company Act Release No. 13101, pp. 9-11 (1956).

The decision below cannot be sustained unless in the interpretation of both sentences the court's view is correct and that of the S. E. C. is wrong. If the court erred as to either sentence—as to the S. E. C.'s authority to reopen, or as to the availability or scope of judicial review—a reversal is required and the Court need not consider issues (discussed *infra*, pp. 36–47) involving the S. E. C.'s substantive legal determinations in the proceeding concluded in 1953.

A. THE COURT BELOW ERRED IN HOLDING THAT SECTION 11 (b) AUTHORIZES THE REOPENING OF A CONCLUDED PROCEEDING EVEN IN THE ABSENCE OF A CHANGE IN CIRCUMSTANCES

Reconsideration of an order, years after the time to seek review has expired, on the ground that the record upon which it was entered was faulty, is rarely permitted by an administrative agency. Even more infrequent is a situation in which such agency reconsideration is *required* by a reviewing court. We are, in fact, aware of no case where the mere fact that a better showing might have originally been made, without a satisfactory excuse why it was not made, has been deemed sufficient ground to require reopening after the time for appeal has expired.¹¹ Under the holding below, however, merely upon an allegation that data in the original record before the S. E. C. was erroneous or incomplete, and even without

¹¹ Compare Rule 60 (b) of the Federal Rules of Civil Procedure, which limits reconsideration on the basis of mistake, inadvertence, surprise, excusable neglect, or newly-discovered evidence, *inter alia*, to "a reasonable time, and * * * not more than one year after the judgment, order, or proceeding was entered or taken."

any allegation of a change in conditions, a "person or party aggrieved" could obtain at any time in the indeterminable future a reopening of a concluded proceeding in which a "final and binding" Section 11 (b) order has been rendered.

Such an unusual result could be reached only if the statutory language is so clear that it precludes any other interpretation or, if ambiguous, that it is wholly consistent with the aim of the statute.¹⁸ The court below recognized that its interpretation was not expressly required by the statutory language.¹⁹ While the statutory language, taken out of context, might possibly be susceptible to the construction given it by the court, we submit that a more natural construction is that the words "conditions upon which the order was predicated do not exist" mean only that the conditions no longer exist. Had Congress intended to permit a rehearing only on the basis of the facts actually existing when the original order was entered, it would presumably have said, instead, "conditions upon which the order was predicated *did* not exist"; and if both

¹⁸ It is the "well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 335 U. S. 1, 31. *Cf. United States v. Public Utilities Commission*, 345 U. S. 295, 315; *United States v. American Trucking Associations*, 310 U. S. 534, 542.

¹⁹ The court said: "The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order" (R. 138).

situations were intended to be covered (i. e., a rehearing on the basis of existing facts, as well as a modification on the basis of change), as the court below appears to have held, this could easily have been made clear by adding to the end of the sentence "or did not then exist."

That Congress did not do so was not because of any lack of precision of draftsmanship but rather was because there was no logical purpose to be achieved by this result and, moreover, because the result would have been wholly inconsistent with the statutory aim to provide "as soon as practicable" for compliance with the standards of Section 11 (b). The court's ruling would destroy the finality of Section 11 (b) determinations, since a "person or party aggrieved" would generally find little difficulty in pointing to some fact not brought to the S. E. C.'s attention in the original proceeding as a basis for securing a re-opening.²⁰ It would permit proceedings which had

²⁰ Moreover, in the hope of preventing this possibility, the S. E. C. in future proceedings under Section 11 (b) would be placed under the impossible burden of seeking out and placing in evidence all possible facts bearing on all issues, including facts required to disprove that a company comes within an exception to the general standards required for retention of an additional system under the Act—a result contrary to accepted principles relating to the burden of proof. See, e. g., *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1; *Ryan v. Carter*, 93 U. S. 78; *Walling v. Reid*, 189 F. 2d 323 (C. A. 8). In the *Schlemmer* case, Mr. Justice Holmes pointed out that a proviso "merely creates an exception, which has been said to be the general purpose of such clauses" and that "if the defendant wished to rely upon * * * [the] proviso, the burden was upon it to bring itself within the exception." 205 U. S. at 10.

been closed and terminated to be opened on the theory, as here, that a better case could have been made by a person not appearing in the previous proceeding had he but chosen to appear. Moreover, a holding made in connection with the issuance of an original Section 11(b) order and upheld by one court of appeals could be re-examined by another court of appeals after the denial by the S. E. C. of a petition to reopen, since under Section 24 (a) a "person or party aggrieved" may seek review either in the Court of Appeals for the District of Columbia Circuit or in the court of appeals where he resides or has his principal place of business." The desirable purpose of having a Section 11 (b) order give certainty to the direction to be followed by holding company systems in complying with the standards of Section 11 (b) would be defeated, and holding company systems, which were in-

² Whether or not a court of appeals could require a person who sought review of the original order in a different circuit to return to that circuit on review of a denial of a petition to reopen the earlier proceeding, it would seem that under no circumstances could a court of appeals preclude a different person from seeking review in a forum other than that in which review was sought of the original order. This was the situation in the *International Hydro-Electric System*, 12 S. E. C. 999, where a Section 11 (b) order directed to that system was affirmed by the Court of Appeals for the Sixth Circuit in *Todd v. Securities and Exchange Commission*, 137 F. 2d 475; several years later, on a petition to review filed by a different person, the S. E. C.'s dismissal of an application to modify that order was affirmed by the Court of Appeals for the Second Circuit. *Protective Committee v. Securities and Exchange Commission*, 184 F. 2d 646. In the latter case, the court re-affirmed determinations made in connection with the original order but its opinion dealt for the most part with events which had occurred subsequent to the original ruling.

tended to be given in the first instance the opportunity to devise the means for working out their problems under Section 11 (b), would in all probability be reluctant to comply with such impotent orders." Moreover, the rehearings required would necessitate long preparation, involved and sometimes protracted administrative proceedings, and the possibility of time-consuming appeals."

The interpretation of the court below is also inconsistent with the review provisions contained in Section 24 of the Act which make clear that a person or party seeking court review of either the legal or factual determinations embodied in a Section 11 (b) order must do so within sixty days. So that there may be an end to litigation, the rule is that failure to file a timely petition for review, as a jurisdictional matter, precludes appellate review." Accordingly, if on De-

²² See Section 11 (e) of the Act. And see *Phillips v. Securities and Exchange Commission*, 185 F. 2d 746, 750-751 (C. A. D. C.). See also S. Rep. 621, 74th Cong., 1st Sess., p. 13, and Additional Views of Congressman Eicher appended to H. Rep. 1318, 74th Cong., 1st Sess., p. 50, wherein he states: "If the compulsions of the act are made sufficiently clear to convince the interlocking lawyers of the holding-company bankers that it can't be evaded or compromised, the legal and economic imagination which put these holding-company combinations together will devise many means of taking them apart."

²³ See our petition for certiorari, pp. 13-17, for a discussion of the number of utility systems which might seek reopenings of Section 11 (b) orders under the opinion below.

²⁴ Statutory requirements with respect to the time for seeking appellate review in the federal courts are considered mandatory and jurisdictional, and are normally not subject to extension by waiver, consent, acquiescence, or even by the order of the court.

See *Lasley v. Commissioner*, No. 371, this Term, decided March

cember 22, 1954, the day the petition for reopening was filed, the respondent Louisiana Commission had instead filed in a court of appeals a petition to review the 1953 order, that petition obviously would have had to be dismissed for lack of jurisdiction.²⁵ Yet the respondent accomplished the same result—i. e., secured review of factual and legal determinations made in the earlier order—through the device of appealing from an S. E. C. order denying a reopening.

Also, through indirection, the Louisiana Commission has circumvented the provision in Section 24 (a) that where "application is made to the court for leave to adduce additional evidence" it is required to be shown not only "that such additional evidence is material"²⁶ but also "that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission." The Louisiana Commission was given notice of the hearing and opportunity to present evidence establishing that the gas properties could not be divested without a "loss of substantial economies." It did not see fit to appear at that time. After

11, 1957; *Columbia Oil & Gasoline Corp. v. Securities and Exchange Commission*, 134 F. 2d 265 (C. A. 3); *United States v. Ragen*, 171 F. 2d 788 (C. A. 7) certiorari denied, 337 U. S. 910; *St. Luke's Hospital v. Melin*, 172 F. 2d 532 (C. A. 8).

²⁵ Cf. *In re Community Gas & Power Co.*, 168 F. 2d 740, 744 (C. A. 3), certiorari denied, 334 U. S. 846; *New York Trust Co. v. Securities and Exchange Commission*, 131 F. 2d 274, 275 (C. A. 2), certiorari denied, 318 U. S. 786.

²⁶ Petitions under Section 24 (a) were denied on this ground in *Central & South West Utilities Co. v. Securities and Exchange Commission*, 136 F. 2d 273, 275 (C. A. D. C.), and in *Koppers United Co. v. Securities and Exchange Commission*, 138 F. 2d 577, 581 (C. A. D. C.).

the order of March 20, 1953, was entered, the Louisiana Commission had the opportunity to petition for a rehearing "within 5 days after issuance of the order complained of," in accordance with Rule XII (e) of the S. E. C.'s Rule of Practice (17 C. F. R. 201.12 (e)). No such petition was filed. And the subsequent statements made on behalf of the Louisiana Commission, in attempting to explain its failure to appear sooner, were inconsistent. In its brief filed with the S. E. C. on May 2, 1955, in support of its petition to reopen, the Louisiana Commission stated, as a reason for not appearing in the original proceeding, that it had not "at that time made a study of the effects of a disposition by Louisiana [Power] such as was subsequently ordered by S. E. C." (R. 50). However, on July 7, 1955, at the oral argument before the S. E. C., counsel for the Louisiana Commission stated that the Louisiana Commission "did not appear originally in these proceedings, and through a clerical mishap, though the notice was received from this Commission [S. E. C.] about the proceedings which were tried in February, 1953, the members of the [Louisiana] Commission were not notified personally and did not know that the hearing had gone on when it did" (R. 78, Doc. 108, p. 10). The Louisiana Commission's statements would not seem to constitute "reasonable grounds" for its failure to have adduced "additional evidence" in the proceeding before the Commission.²⁷

²⁷ Cf. Rule 60 (b) (2) of the Federal Rules of Civil Procedure, where newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial * * *" is stated as a ground for reopening a final order."

In the S. E. C.'s view, the penultimate sentence of Section 11 (b) serves a rational purpose which is wholly in accord with the aim of the statute to bring about reasonably prompt compliance with the standards of Section 11 (b) and is consistent with other provisions of the Act. This sentence, we believe, was inserted to make clear that, despite the fact that Section 11 (b) orders are final and binding determinations, they might be modified at the S. E. C.'s discretion where subsequent changes of circumstances warrant such action.²² For example, under Section 11 (b) (1), the S. E. C. might have originally ordered that a registered holding company should be permitted to continue to control an "additional integrated public-utility system", finding among other things that the additional system could not be operated as an independent system without the loss of substantial economies. In this situation, to carry out the statutory purpose, it is necessary that the S. E. C. should not be precluded, at a subsequent date and after a change in the conditions upon which it had initially relied, from determining that severance would no longer result in the loss of substantial economies and from thereupon ordering divestment. Or, where there has been a directive to divest, conditions might so change during the period prior to compliance as to make the earlier directive inappropriate. In the absence of a specific statutory provision, there might be some doubt whether the S. E. C., as an administra-

²² Cf. *Mine Workers v. Eagle-Picher Co.*, 326 U. S. 335, 342, where this Court discussed a similar provision in the National Labor Relations Act.

tive agency, would be able to remedy the situation by modification or reversal of earlier Section 11 (b) orders, particularly since these were made subject to direct court review and could be judicially enforced." Congress chose to leave no doubt respecting such an important matter and explicitly made provision, in the sentence under consideration, for the Commission to revoke or modify a Section 11 (b) order where it "finds that the conditions upon which the order was predicated do not exist."

As previously noted, the S. E. C.'s construction has been consistent and its construction, as the agency administering the statute, should be controlling unless plainly erroneous." The S. E. C.'s interpretation,

"This Court was subsequently divided on such an issue in *Mine Workers v. Eagle-Picher Co.*, 325 U. S. 335. The majority held that an order of the National Labor Relations Board which had been enforced by a court decree was not subject to challenge nearly two years after the entry of the decree. In so ruling, the Court stated (325 U. S. at 340): "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation." The Court further declared that "[a]dministrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction" (325 U. S. at 341). But compare the dissenting opinion (especially 325 U. S. at 355-356).

Section 20 (a) of the Act, giving the S. E. C. the power "to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions" of the Act may have been too general to provide clear authority to resolve this problem.

"*United States v. Allen-Bradley Co.*, 352 U. S. 306, 309, 310; *National Labor Relations Board v. Denver Building Council*, 341 U. S. 675, 691-692; *Bowles v. Seminole Rock & Sand Co.*,

moreover, contrary to an intimation in the opinion of the court below (R. 138, fn. 4), is fully in accord with *American Power & Light Company v. Securities and Exchange Commission*, 329 U. S. 90, 121, where this Court declared that companies ordered by the S. E. C. to be dissolved were not precluded during the period of compliance "from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist." This statement does no more than repeat the statutory language and, if anything, presumably refers to the S. E. C.'s suggestion in its brief in that case that modification might be appropriate in the event of a change in conditions which might have occurred after the entry of the orders and before compliance was

325 U. S. 410, 413-414; *United States v. American Trucking Associations*, 310 U. S. 534, 549. The importance of the S. E. C.'s construction of the Act here involved was discussed in *Securities and Exchange Commission v. Associated Gas & Electric Co.*, 99 F. 2d 795, 798 (C. A. 2):

"Moreover, we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction. *Norwegian Nitrogen Products Co. v. United States*, 228 U. S. 294, 315 * * *"

And see *North American Utility Securities Corp. v. Posen*, 176 F. 2d 194, 197 (C. A. 2). Cf. *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 112; *Securities and Exchange Commission v. Central-Illinois Corp.*, 338 U. S. 96, 126-127.

completed.” See also *Central & South West Utilities Co. v. Securities and Exchange Commission*, 136 F. 2d 273 (C. A. D. C.), where the court, in denying petitioner’s motion to introduce additional evidence pursuant to Section 24 (a) on appeal from a similar order, stated that (136 F. 2d at 275): “Section 11 (b) authorizes the Commission to revoke or modify its order, after notice and hearing, in response to *changed* conditions * * *.” (Emphasis added.) And see *Equity Corporation v. Brickley*, 237 F. 2d 839 (C. A. 1), where, on the basis of the penultimate sentence of Section 11 (b), the court held that, in view of the “drastically altered condition” of the holding company there involved, the S. E. C. had power to modify a previous dissolution order, despite the fact that an earlier order refusing to modify the plan had been affirmed on appeal.

B. IN ANY EVENT, THE COURT BELOW ERRED AS TO THE AVAILABILITY AND SCOPE OF JUDICIAL REVIEW OF THE COMMISSION’S REFUSAL TO REOPEN

Because the determination of the court below that there should be a reopening of the earlier proceeding was based, as we have shown, on its erroneous construction of the clause “that the conditions upon

²¹ It was stated in the S. E. C.’s brief filed with this Court that if “petitioners could be transformed into holding companies which served the function of tying together properties satisfying the standards of Section 11 (b) (1) and needing a parent holding company, and if it appeared that either of petitioners would be an appropriate corporate vehicle for such purpose, then there would be room for modification of * * * [the S. E. C.’s] orders under the express provisions of Section 11 (b) applicable in the event of change of circumstance”. (Brief for the S. E. C. in Nos. 6 and 7, 1945 Term, pp. 133-134.)

which the order was predicated do not exist," the S. E. C.'s 1955 order must be sustained. But, even if the court's construction of that clause were correct, reversal would still be required since the court erred both as to the availability and scope of review.

The court interpreted the last sentence of Section 11 (b) as making expressly reviewable the Commission's denial of the request to reopen. That sentence makes "any order made under this subsection" subject to judicial review pursuant to Section 24 of the Act. However, the only "orders" mentioned in Section 11 (b) are the orders directing that certain action be taken to comply with the standards thereof and the orders revoking or modifying such orders; there is no mention of orders *denying* a request for modification or revocation. Every action of the S. E. C. which it designates as an "order" is not necessarily considered to be an order within the meaning of the review provisions." As we have noted, the importance of a Section 11 (b) directive, issued after notice and opportunity for hearing, requires that it be directly reviewed, and for the same reason the revocation or modification thereof, after notice and opportunity for hearing, should be directly reviewed. However, whether review was intended for Commission action which did not revoke or modify the existing directive

²² Petitions for review of "orders" in Section 11 (b) proceedings have been dismissed, for example, in *Phillips v. Securities and Exchange Commission*, 171 F. 2d 180 (C. A. 2); *Eastern Utilities Associates v. Securities and Exchange Commission*, 162 F. 2d 385 (C. A. 1), and *Okin v. Securities and Exchange Commission*, 143 F. 2d 960 (C. A. 2). Cf. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 385.

as to a particular holding company system—which merely maintained the status quo—is at least doubtful.

Assuming *arguendo* that under certain circumstances there may be review of an order *denying* revocation or modification, we contend that such review would nevertheless be unavailable from the denial of a petition to reopen to the extent that the petition is based on facts which existed at the time of the original hearing. In other words, even if the penultimate sentence of Section 11 (b) should be construed to authorize the S. E. C. to revoke or modify a prior order upon a finding that the conditions upon which it was predicated did not truly exist at the time of the entry of the original order, it does not follow that denial of a petition to reopen made upon such a ground would be reviewable. Indeed, it would be unreasonable to assume that Congress intended more than to make clear that the S. E. C., in its discretion, might reconsider its previous order upon the basis of a corrected record. There is no reason why denial of such a petition, which is in essence only a petition for rehearing, should be any more subject to review than denial of any other petition for rehearing, the normal basis for which is also that the original record was faulty. And it is settled law that the denial of a petition for rehearing is wholly discretionary and is not reviewable. *Roemer v. Bernheim*, 132 U. S. 103, 106.

Particularly after the time for appeal has expired, it is clear that a party may not “reinvest himself” with the right of appeal by filing a petition for rehearing. *Conboy v. First National Bank of Jersey*

City, 203 U. S. 141, 145; cf. *Lasky v. Commissioner*, No. 371, this Term, decided March 11, 1957. Indeed, even where an agency has reopened a record to reconsider a particular aspect thereof, this Court has held that it was reversible error for a court of appeals to require the agency to grant a petition to reopen the entire proceeding. *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503. The Court there stated: "It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body" (322 U. S. at 514-515).³³ This principle has been applied to the denial of a petition for reconsideration of an order under Section 11 (e) of the Holding Company Act designed to effect compliance with Section 11 (b). See *Skowhegan Savings Bank v. Securities and Exchange Commission*, 201 F. 2d 702 (C. A. D. C.), where the court stated that such a denial was "not in and of itself" appealable under the statute."³⁴

³³ No greater rights have been afforded by the Administrative Procedure Act, since the introductory clause of Section 10 (5 U. S. C. 1009), the section dealing with judicial review of agency action, specifically excepts from its terms the situation where "agency action, is by law committed to agency discretion."

³⁴ In the instant case, it is clear that the S. E. C., in its discretion, merely denied the Louisiana's Commission petition for reopening; it did not grant reopening and then deny modification on the merits. As the S. E. C. pointed out (R. 131-132), it considered the offer of proof and arguments merely to determine whether the record should be reopened. Having determined not to grant the petition to reopen, there was no occasion to receive evidence, either for or against the retention of

Finally, even if this Court should disagree with the foregoing analysis and conclude that some review of the S. E. C.'s order was appropriate, we submit that the court below nevertheless erred in holding that its review was "not circumscribed by the rules applying to review of discretionary acts" (R. 138). The penultimate sentence of Section 11 (b), it should be noted, provides only that the Commission "may" revoke or modify its previous order, whereas other provisions of Section 11 (b) use mandatory language (as, for example, that involved in Point II, *infra*, that the Commission "shall" permit retention of additional public utility systems where certain requirements are met). In view of the discretionary nature

Louisiana Power's gas properties, and no such evidence was received. Accordingly, the question of whether, upon a reopened record, a subsequent reaffirmance of the original order might have been reviewable, as appears to be the rule in certain bankruptcy cases, is not here involved. See *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131; and *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144. These cases hold that such review is available only where there has been a grant of a petition to reopen and an evidentiary hearing. As pointed out in the *Pfister* case, *supra*, (317 U. S. at 150): "* * * where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order." Similarly, in the *Skowhegan* case, *supra* (201 F. 2d at 705), where a plan under Section 11 of the Holding Company Act was involved, the court said: "The petition for reconsideration, and its denial, even after extended discussion, could not serve to enlarge the statutory period for appeal."

of the pertinent language, it would appear that judicial review, if any, must be limited to a consideration of whether there had been an abuse of discretion. No such abuse, we believe, can be shown here. In denying the petition of the Louisiana Commission, the S. E. C. pointed out (R. 131):

We are of the opinion that no basis for reopening the proceedings culminating in our order of March 20, 1953 has been shown. Those proceedings involved a full hearing at which Louisiana Power, and its parent, Middle South Utilities, Inc., appeared, adduced evidence and presented arguments that Louisiana Power could retain its gas properties consistently with the standards of Section 11 (b) (1) of the Act. The Louisiana Commission, although duly notified of the proceedings, did not appear and took no part therein. After full consideration we issued a Findings and Opinion which set forth in detail the reasons why the standards of Section 11 (b) (1) would not permit the retention of the non-electric properties of Louisiana Power. No petition for a review of our order was filed.

The S. E. C. also noted that the Louisiana Commission, in its offer of proof, did not allege or indicate that the S. E. C.'s original factual conclusions were incorrect (R. 131-132). In view of the foregoing considerations, coupled with the lack of any change in circumstances," an abuse of discretion is not shown

"The fact that in the instant case the offer of proof submitted by the Louisiana Commission was based in part on a study derived from more recent data than had been available at the original hearing does not indicate any such change, nor

merely on the basis of the alleged differences from the original record that the Louisiana Commission offered to prove. Particularly is this so in view of the desirability of having an end to litigation and in view of the Congressional mandate to secure compliance with the Act's standards "as soon as practicable."

II

UNDER SECTION 11 (b) (1) (A), THE "LOSS OF SUBSTANTIAL ECONOMIES"—A PREREQUISITE TO RETENTION BY A REGISTERED HOLDING COMPANY OF "ADDITIONAL SYSTEMS"—REFERS ONLY TO A LOSS WHICH WOULD BE INCURRED BY THE "ADDITIONAL SYSTEMS" AND WHICH WOULD CAUSE SUCH SERIOUS ECONOMIC IMPAIRMENT TO THE "ADDITIONAL SYSTEMS" AS TO PREVENT THEIR EFFICIENT OPERATION UNDER SEPARATE OWNERSHIP

As noted earlier (pp. 14-15), in order to eliminate pre-existing abuses and to effectuate the policy of divesting holding company systems "of properties detrimental to the proper functioning of such systems", Section 11 (b) (1) of the Act requires that the operations of each registered holding company system be limited to a "single integrated public-utility system" and to certain incidental businesses. By a

did the court below so find. There was clearly no such change in conditions as would empower a court to determine that the S. E. C. abused its discretion in refusing to reopen the earlier proceedings on this ground. Cf. *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 514: "One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order."

proviso to Section 11 (b) (1), however, retention of one or more additional systems is permitted as an exception to this integration requirement if it can be demonstrated that such retention meets the exacting requirements set forth in Clauses (A), (B), and (C) of the proviso. Clause (A), the only one of these clauses here involved, requires that a registered holding company, to retain additional systems, must show that—

Each of such additional systems cannot be operated as an independent system without the *loss of substantial economies* which can be secured by the retention of control by such holding company of such system. [Emphasis added.]

The S. E. C. interpreted the italicized phrase “loss of substantial economies” to refer only to the potential loss which would be incurred by the additional system if there were divestment (R. 118). It also held that to permit retention the estimated loss had to be substantial enough to cause such a serious economic impairment as would preclude the additional system from operating efficiently under separate ownership (R. 117). The court below held that the S. E. C. erred in both respects—*i. e.*, it held that (a) the loss referred not only to the additional system sought to be divested but also to the principal system, and (b) the S. E. C.’s interpretation of substantial economies was in some undefined manner unduly restrictive

(R. 139-142).³⁰ We show below that the S. E. C.'s interpretation is in accord with the policy of the Act as expressed in the legislative history, with the previous administrative constructions, and—until the ruling below—with the decisions of the courts.

A. THE COURT BELOW ERRED IN HOLDING THAT THE REQUIRED "LOSS" REFERS TO THE LOSS TO THE PRINCIPAL SYSTEM AS WELL AS TO THE LOSS TO THE "ADDITIONAL SYSTEMS"

The retention of an additional integrated system is by the very terms of Section 11 (b) (1) an exception to the general statutory scheme of limiting the holding company to a single integrated system. The underlying premise of that section is that an undue extension of the field of operations of a holding company system is not conducive to efficiency, or, in any event, does not result in efficiencies commensurate with the social and economic disadvantages involved. As was stated in the report of the National Power Policy Committee: "intensification of economic power beyond the point of proved economies not only is susceptible of grave abuse but is a form of private socialism

³⁰ The court did not find that the S. E. C.'s conclusion that there were not substantial economies was erroneous but it held that in making its findings the S. E. C. had "refused to give weight to important facts which * * * would have presented an entirely different picture." It stated that the claimed losses of economies in the amount of \$684,377 to the principal system added to the \$272,816 of the additional system "constituted a sizable, if not a substantial, figure" (R. 141).

inimical to the functioning of democratic institutions and the welfare of a free people."³⁷

In S. 2796, as first passed by the Senate, there were no provisions for the retention of additional systems under any circumstance. These provisions were amended by the House to permit the holding company to retain one or more additional systems where consistent with the public interest.³⁸ The House substitute was criticized on the ground that it was too indefinite as an effective administrative guide and so broad as to defeat the basic purpose of Section 11.³⁹ The present proviso, which was a compromise adopted in conference, set forth the limited circumstances under which retention of an additional system or systems would be permissible. The Statement of the Managers on the part of the House accompanying the Conference Report, after emphasizing explicitly

³⁷ See Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., p. 4 (1935)) appended to S. Rep. No. 621, 74th Cong., 1st Sess. (1935). The National Power Policy Committee was an interdepartmental committee appointed by the President and composed of persons in the Government, most concerned with the power problem. The first draft of what is now the Holding Company Act was prepared by the Committee in collaboration with leaders in the House and Senate. See Hearings Before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., p. 156 (1935).

³⁸ H. Rep. No. 1318 on S. 2796, 74th Cong., 1st Sess. (1935), p. 17.

³⁹ Letter of Joseph P. Kennedy, then Chairman of the S. E. C., 79 Cong. Rec. 10838 (July 9, 1935); additional views of Congressman Eicher, H. Rep. No. 1318 on S. 2796, 74th Cong., 1st Sess., p. 45 (1935).

that both the Senate and the House bills required the holding company to limit its operations to a single integrated system, pointed out:

The substitute * * * makes provision to meet the situation where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems under localized management with a principal integrated system.*

This was also elaborated by Senator Wheeler, Chairman of the Senate Committee on Interstate and Foreign Commerce, and in charge of the bill, who orally reported the results of the conference to the Senate:

Since both bills accepted the proposition that a holding company should normally be limited to one integrated system, my colleagues and I conceived it to be our task to find what concrete exceptions, if any, could be made to this rule that would satisfy the demand of the House for some greater flexibility. After considerable discussion the Senate conferees concluded that the furthest concession they could make would be

* H. Rep. No. 1903, 74th Cong., 1st Sess., p. 71 (1935).

In a discussion on the floor of the House on a motion to instruct the House conferees to adopt the compromise version of Section 11 (b) that was ultimately passed, Representative O'Connor, in support of the motion, envisaged, by way of illustration, the independence of "a little power plant in Florida" or "a little plant in Oklahoma" (79 Cong. Rec. 14168); and Representative Cooper, ranking minority member of the Committee on Interstate and Foreign Commerce, who had opposed the motion, had referred to systems retainable under Clause (A) as "unprofitable companies * * * too weak to stand alone" (*id.* at 14165-14166.)

to permit the Commission to allow a holding company to control more than one integrated system if the additional systems were in the same region as the principal system and were so small that they were incapable of independent economical operation * * *⁴¹

In short, Congress expected that an additional system able to stand alone—i. e., capable of managing its own affairs—was to be given its independence.

As a corollary to this statutory scheme, it is implicit in Clause (A) that the loss of economies must be measured by its effects upon the additional systems alone, and not, as the court below holds, upon both the principal and additional systems.⁴² Accordingly, the

⁴¹ 79 Cong. Rec. 14479 (Aug. 24, 1935). The Conference Report was accepted by the Senate (*id.* at 14473) just prior to Senator Wheeler's oral report on the conference and before the bill was signed by the President. Senator Wheeler's statement has been cited as a relevant aid to the interpretation of the statute. *Philadelphia Co. v. Securities and Exchange Commission*, 177 F. 2d 720, 725 (C. A. D. C.); *Engineers Public Service Co. v. Securities and Exchange Commission*, 138 F. 2d 936, 941-942 (C. A. D. C.), vacated as moot, 322 U. S. 788.

This Court has recently noted the importance of an "explicit statement by the one most responsible" for the legislation. *Lee-don v. International Union*, 352 U. S. 145, 150.

⁴² Even if it be assumed *arguendo* that the "loss of economies" to the principal system had been a relevant factor, the court below also erred (R. 141, 142) in its apparent disagreement with the S. E. C.'s position that it would then be necessary to relate the loss to all the electric properties comprising the principal integrated public utility system retainable by Middle South (R. 118) rather than to the electric properties of Louisiana Power alone. An "integrated public-utility system", with respect to electric utility companies, is defined in Section 2 (a) (29) (A) of the Act as consisting of those utility assets, "whether owned by one or more electric utility companies" in

S. E. C." and the Court of Appeals for the District of Columbia Circuit have held that the losses to be considered must relate solely to the additional system. In *Engineers Public Service Co. v. Securities and Exchange Commission*, 138 F. 2d 936 (C. A. D. C.), the court pointed out that the question in that case was "whether or not the facts as they were revealed at the hearing give reasonable support to the Commission's conclusion that 'substantial economies' would not be saved to 'Virginia Gas' [the additional system] by reason of 'Virginia Electric's' [the principal sys-

the holding company system, which the S. E. C. finds are physically interconnected and economically operated as a single coordinated system. Since the S. E. C. has found that the electric properties of all four electric utility companies in the Middle South system constituted the principal system in the Middle South holding company system; any loss of economies resulting from the separation of the gas properties of Louisiana Power from the principal system should be related to the entire principal system and not merely to a portion thereof, i. e., Louisiana Power's properties. The difference in the result is significant. By comparing the losses of \$957,193 anticipated by the Louisiana Commission (R. 141) with Louisiana Power's operating revenues of \$29,631,158 for the year 1954, a percentage loss of 3.23% is reached; while if compared with the entire Middle South operating revenues of \$143,569,552 for the year 1954, a percentage loss of only 0.67% results.

"Although the S. E. C., in some opinions, has not reached this question, finding that the overall losses that might be caused from severance were insubstantial, the Commission has specifically held that only the losses to the additional systems are relevant in *North American Co.*, 11 S. E. C., 194, 208, affirmed, 133 F. 2d 148 (C. A. 2), affirmed, 327 U. S. 686; *Philadelphia Co.*, 28 S. E. C. 35, 52, affirmed, 177 F. 2d 720, 724 (C. A. D. C.); and *General Public Utilities Corp.*, 32 S. E. C. 807, 838-839.

tem's] continued control of the former". Having stated that "substantial economies are important economies", the court held (138 F. 2d at 944): "The required importance must relate to the healthful continuing business and service of the *freed* utility" (i. e., the additional system)." (Emphasis added.) This Court, in *North American Co. v. Securities and Exchange Commission*, 327 U. S. 686, indicated its concurrence with this view. Although the sole issue in that case was the constitutionality of Section 11 (b) (1), in summarizing the provisions of that section the court said (327 U. S. at 696-697): "In essence, it confines the operations of each holding company system to a single integrated public utility system with provision for the retention of *additional systems* only if *they* are relatively small, located close to the single system and unable to operate economically under separate management without the loss of substantial economies * * *." [Emphasis added.]

The court below, in holding that the losses should be examined in connection with both the principal and additional systems, completely discounted the legislative history, stating (R. 139-140) that "the language of a statute should be construed, if possible, by taking the usual intendment of the words without reference

* See also *Philadelphia Co. v. Securities and Exchange Commission*, 177 F. 2d 720 (C. A. D. C.), where, despite the fact that this question was fully briefed by the parties, the court in its rather extended opinion made no reference to the alleged savings to the principal system except to comment in a footnote that the company's witness "also testified" as to the amount that separation would increase the expense of the principal electric system (177 F. 2d at 724, n. 17).

to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear." The court's construction, however, is surely no more "clear" than the S. E. C.'s construction. If anything, the contrary is true. The normal reading of the language, we believe, would be to relate "loss of substantial economies" only to the antecedent words "each of such additional systems." The legislative history is offered, not to overcome a literal interpretation of the pertinent language, but rather merely to confirm an interpretation which, at the very least, is as "clear" as that of the court below.

B. THE COURT BELOW ERRED IN HOLDING THAT THE REQUIRED "LOSS OF SUBSTANTIAL ECONOMIES" MAY BE SOMETHING LESS THAN A LOSS THAT WOULD CAUSE SUCH SERIOUS ECONOMIC IMPAIRMENT TO THE SYSTEMS INVOLVED AS TO PREVENT THEIR EFFICIENT OPERATION UNDER SEPARATE OWNERSHIP

Also consistent with the statutory scheme, as evidenced by the legislative history (pp. 38-41, *supra*), is the S. E. C.'s interpretation of the term "substantial economies" as economies of sufficient importance that their loss would cause a serious economic impairment of the system to be divested, so as to render it incapable of independent economical operation."

⁴⁵ We are aware of no decision of the S. E. C. inconsistent with its interpretation of "substantial economies" in this case. The S. E. C. applied the same test in *General Public Utilities Corporation*, 32 S. E. C. 807, 826-827; *Philadelphia Co.*, 28 S. E. C. 35, 46, 47, affirmed, 177 F. 2d 720 (C. A. D. C.); and *Federal Water and Gas Corp.*, 12 S. E. C. 766, 775, 777. Cf. *North American Company*, 11 S. E. C. 194, 209, affirmed, 133 F. 2d 148 (C. A. 2), affirmed, 327 U. S. 686.

As held in *Engineers Public Service Co. v. Securities and Exchange Commission*, 138 F. 2d 936, 944 (C. A. D. C.):

"Substantial economies", means something different and, we think, something more than substantial savings in operational expenses. Congress could have said that the divorcement shall not be decreed if the controlling utility or the controlled utility show at a hearing that the cost to operate the latter separately from the former would be substantially greater. If the Act can be construed as meaning just that, then the severance ordered here is wrong. * * * But Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases.

In the *Engineers* case, it was also emphasized that, even though there might be a showing of "saving" in permitting a combined operation, it need not be assumed this "saving would constitute an overall substantial economy," when taking into consideration "so important an event as the freedom of a corporation from the ownership and control of another corporation engaged in a business to some extent intercompetitive * * *" (138 F. 2d at 944).⁴⁰ And in *Philadel-*

⁴⁰ The court below misread the *Engineers* case when it cited that opinion for the proposition that the question of the importance of the economies "must, of course, be determined by the bearing they have on the ability of the two systems to con-

phia Co. v. Securities and Exchange Commission, 177 F. 2d 720, the Court of Appeals for the District of Columbia Circuit reaffirmed its holding in the *Engineers* case that economies are not substantial unless their loss is of such magnitude as to make severance economically impossible. The court stated (177 F. 2d at 725):

In the Commission's view, economies are not "substantial" unless their loss "would cause a serious economic impairment of the system" such as to "render it incapable of independent economical operation." * * * "Substantial" is a relative and elastic term. Petitioners concede that economies, to be substantial, must be "important". We cannot say that the Commission's understanding of the term "substantial economies" is wrong. We construed it similarly in the *Engineers* case.

Similarly, the inability "to operate economically under separate management" has been stated by this

tinue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses" (R. 142). The language paraphrased from the *Engineers* opinion was used in that opinion in the context indicated in the text above. The court below used it, however, in a manner which failed to take into consideration the importance of "freedom" of the controlled additional system and the "intercompetitive" nature of the business.

Court in the *North American Co.* case as a criterion for retention (p. 43, *supra*)."

"We note one final difficulty with the opinion of the court below. It is uncertain what import is to be given to the restriction that "the further consideration to be given to this matter by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order" (R. 142). In its opinion in connection with its March 20, 1953 order, the S. E. C. stated that it did not "propose at this time to take any action with respect to the gas and transportation properties of New Orleans [Public Service, Inc.] under the standards of Section 11 (b) (1) of the Act" (R. 121). We think it wholly improper for the court below to indicate, as its opinion might be construed, that the S. E. C., in reopening the proceeding, would be precluded from considering this reserved problem, particularly in the light of Clause (C) of Section 11 (b) (1) of the Act, which provides that the S. E. C. cannot permit the retention of additional systems where the continued combination of all the systems under common control would be so large as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation. Since the S. E. C. found that the standards of Clause (A) had not been met, it never considered the application of Clause (C) with respect to Louisiana Power's gas properties. Any restriction on its right to consider the application of that clause with respect to the effect of the retention of the gas properties of both Louisiana Power and New Orleans upon the entire Middle South holding company system would be an undue interference with the task which Congress has entrusted in the first instance to the S. E. C.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

J. LEE RANKIN,
Solicitor General.

THOMAS G. MEEKER,
General Counsel,

DAVID FERBER,
Assistant General Counsel,

SOLOMON FREEDMAN,
Assistant Director,
Division of Corporate Regulation,

JOSEPH B. GILDENHORN,
Attorney,
Securities and Exchange Commission.

MARCH 1957.

APPENDIX

Section 11 (b) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79k (b), 49 Stat. 820):

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the

state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

Section 24 (a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79x (a), 49 Stat. 834):

Any person or party, aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by

the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

C

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

**LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE
SOUTH UTILITIES, INC., and LOUISIANA POWER &
LIGHT COMPANY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

**REPLY BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION**

OPINIONS BELOW

The findings and opinion of the Securities and Exchange Commission of March 20, 1953, have now been reported at 35 S. E. C. 1.

ARGUMENT

**I. THE LOUISIANA COMMISSION MADE NO OFFER TO PROVE
A CHANGE IN CONDITIONS SINCE THE 1953 ORDER**

The Louisiana Commission implies that its petition to reopen the 1953 proceeding was based on changed conditions subsequent to the S. E. C.'s 1953 order (Br. 3, 9, 20). However, an examination of

the entire offer of proof, which (with the exception of certain exhibits not here material) is in the printed transcript of record (R. 1-49), demonstrates that there was no offer to prove changed circumstances. (See, in particular, R. 5.) As we pointed out in our principal brief (p. 35, fn. 35), the fact that the offer of proof was based in part on a study derived from data more recent than the 1952 figures that had been available at the time of the 1953 hearing does not indicate a change of conditions. The S. E. C. specifically found no such change (R. 132), and the court below relied solely on allegations that the conditions at the time of the entry of the 1953 order were otherwise than shown by the record then before the Commission (R. 138).

Louisiana Power also states (Br. 5) that in the 1953 hearing its president "testified that he estimated that there would be a loss of economies in the gas properties on the order of \$250,000, based on his experience in operating these properties of Louisiana from its organization in 1927."¹ This is to be compared with the alleged loss of economies of some \$272,816 in the offer of proof (R. 7). Since the offer of proof was based on figures for the year 1954, when gas revenues were \$5,264,186 (R. 16), as compared to gas revenues of \$3,977,364 for 1952 (R. 125), the percentage of loss of economies, on

¹ No record reference is given for this assertion and we have been unable to locate it in the president's testimony. As noted in the Louisiana Power brief (p. 5), the S. E. C. pointed out in its opinion: "No study of any kind was introduced to show what the expense of the gas properties would be if they were to be operated as a separate unit." And see note 2, *infra*.

the basis of the alleged testimony of the president of Louisiana Power, *decreased* from 6.3% of gas revenues in the year 1952 to 5.2% thereof in the year 1954.²

II. RESPONDENTS' CONTENTIONS RESPECTING REVIEWABILITY OF A DENIAL TO REOPEN A SECTION 11 (b) PROCEEDING ARE WITHOUT MERIT

The respondents Louisiana Commission (Br. 17-19) and Louisiana Power (Br. 23) urge that the last sentence of Section 11 (b), providing for judicial review of "any order made under [Section 11 (b)]", was inserted to emphasize that all orders under that section could be reviewed, including an order denying a petition to revoke or modify an order under that subsection. Louisiana Power cites in this connection a colloquy between Senators Borah and Wheeler on June 10, 1955. It is clear in context, however, that this colloquy related only to the review of an order of divestment or of corporate simplification. Indeed, in the drafts of the bill before the Senate on that date (S. 2796, 74th Cong., 1st Sess.), the last two sen-

² In the "Statement" in its brief (pp. 4-5), Louisiana Power stresses the fact that, from the date of the S. E. C.'s notice of the Section 11 (b) (1) hearing in 1953, only three weeks elapsed until the hearing, and that Louisiana Power did not have time to make a separation study estimating the loss of economies to its gas properties (pp. 4-5). It does not point out, however, that it never asked for any extension of time and, indeed, there is no indication that the company ever contemplated such a study. Had Louisiana Power believed that it was deprived of due process of law or that there was any other procedural error, it could have remedied the situation by petitioning for review in 1953 within the time provided by the statute.

tences of Section 11 (b), providing for revocation or modification of previous orders and specifically for review of Section 11 (b) orders, were not included. The more reasonable explanation for the subsequent insertion of the last sentence of Section 11 (b) is that Congress deemed a specific review provision necessary to make clear that an integration or corporate simplification order entered under Section 11 (b) is reviewable, even though, to effectuate such an order, a subsequent S. E. C. order is necessary.³ Con-

³ See, e. g., *Commonwealth & Southern Corp. v. S. E. C.*, 134 F. 2d 747, at 751 (C. A. 3):

"The orders to be entered by the Commission under Section 11. (b) are fundamentally directions that the companies involved achieve a stated result in integration of operations, divestment of nonintegrated properties, simplification of corporate structure or distribution of voting power in order to meet the standards established by the section. While these orders are final and binding determinations of the result to be achieved it seems clear that Congress intended that the Commission might leave open for later consideration the detailed means by which the result directed should be accomplished.

"It is obvious that in many cases the desired result may be reached in more than one way. Congress evidently intended to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate. This seems clear in the light of the fact that under Section 11 (e) the company is not restricted to proposing a plan of compliance which it is in a position to carry out itself but it may also propose a plan affecting the rights of third persons which it may, through the Commission, request a court to enforce against the opposition of those third persons. It is only if the Company does not propose a plan which the Commission and the court approve that the Commission under Section 11 (d) itself may propose and seek enforcement of a plan against the opposition of the company."

gress apparently feared that it would be contended that a Section 11 (b) order is interlocutory in nature and hence not directly reviewable and sought to preclude this contention, as well as to emphasize the final and binding character of Section 11 (b) determinations. A similar provision is not contained in other sections of the Act since Section 11 (b) is unique in that orders thereunder require subsequent proceedings and orders by the S. E. C.

Of course, orders under Section 11 (b) revoking or modifying previous orders are reviewable, but we submit that action by the Commission, which for convenience takes the form of an order but which the Act does not in terms require to be effectuated by order, may not be reviewable. (See our principal brief, p. 31.) For example, it is clear that an order of the Commission setting a Section 11 (b) proceeding down for hearing is not reviewable.* In this case, the S. E. C. neither revoked nor modified a Section 11 (b) order. Nor, as pointed out at page 33 (fn. 34) of our principal brief, did it reopen the earlier proceeding and, after an evidentiary hearing, reaffirm its earlier order. Hence, the cases cited at page 23 (fn. 8) of the Louisiana Commission's brief are wholly inapposite.

In any event, even assuming *arguendo* that some review is permitted of the S. E. C.'s *denial* of a petition to reopen, it certainly does not follow that the review is unlimited as to scope or standards. (See our principal brief, pp. 32-36.)

* See *Eastern Utilities Associates v. S. E. C.*, 162 F. 2d 385 (C. A. 1).

**III. DETERMINATIONS AS TO DIVESTMENTS OF PROPERTIES
ARE GOVERNED BY THE STANDARDS OF SECTION 11 (b)
(1) AND NOT BY THE PROVISIONS OF OTHER SECTIONS OR
THE DESIRES OF LOCAL AUTHORITIES**

Louisiana Power contends that the action of the S. E. C. in requiring the separation of its non-electric properties from the electric properties of the Middle South system was contrary to the "express intent of Congress as set out in the Act" (Br. 13). It correctly points out that the objectives which the Act sought to achieve and the evils which it sought to cure are set forth in Section 1 (b) of the Act (Br. 15). It erroneously states, however, that none of the evils therein enumerated would be eliminated by the S. E. C.'s 1953 order, and that the order would not further the "public interest" or the interest of "investors" or "consumers" (Br. 13). This argument ignores the provision of Section 1 (b) (4) "that the national public interest, the interest of investors * * * and the interest of consumers * * * are or may be adversely affected— * * * (4) when the growth and extension of holding companies bears no relation to * * * the integration and coordination of related operating properties."

Section 11 (b) (1) of the Act is the section which implements this objective by setting forth the standards for the retention of existing combinations of properties. Although Section 11 was designed "to create conditions under which effective Federal and State regulation * * * [would] be possible,"⁵ the

⁵ See S. Rep. No. 621, 74th Cong., 1st Sess., p. 11, quoted in *North American Company v. S. E. C.*, 327 U. S. 686 at 704, n. 14.

standards to achieve that end were those determined solely by Congress. There is no reference whatsoever in Section 11 to considerations of local or State policy. This omission in Section 11 is significant, since when Congress intended that local policy or the policy of State regulatory authorities should be controlling—as is the case with certain provisions where uniformity on a nationwide basis was apparently considered less important—it made specific provision to that effect in the Act.⁶ Indeed, in Section 10 (f), in

⁶ Thus, under the third sentence of Section 6 (b), the S. E. C. is required to exempt the issue and sale by a subsidiary of a registered holding company of securities issued solely to finance its business, if the issue and sale have been expressly authorized by the appropriate State commission.

Section 7 (g) provides that the S. E. C. shall not permit a declaration regarding the issue or sale of a security by a registered holding company or subsidiary thereof to become effective, if the appropriate State commission informs the S. E. C. that applicable State laws had not been complied with, until and unless the S. E. C. is satisfied that such compliance has been effected.

Section 8, discussed *infra* p. 10, prohibits a registered holding company or any subsidiary thereof from acquiring indirect interests in both gas and electric utilities serving substantially the same territory unless express approval of a State commission is obtained where State law prohibits, or requires approval or authorization for, the direct acquisition of such properties.

Section 9 (b) (1) provides that approval by the S. E. C. of the acquisition by a public utility company of utility assets need not be obtained if such acquisition has been expressly authorized by a State commission.

Section 9 (b) (2) provides that approval by the S. E. C. need not be obtained for the acquisition by a public utility company of securities of its subsidiary public utility company where both companies and all other companies in the same holding company system are organized and operate substan-

connection with the acquisition by registered holding companies of securities or assets of public utility companies, Congress specifically required compliance with State laws but made an exception "where the [S. E. C.] finds that compliance with such State laws would be detrimental to the carrying out of the provisions of Section 11."

Even where there is no such express provision for an exception from State policy, it has been held that the standards of Section 11 must prevail if there is conflict between the standards of Section 11 and the provisions of a section requiring conformity with State policy. *Public Service Commission v. S. E. C.*, 166 F. 2d 784 (C. A. 2), certiorari denied, 334 U. S. 838.⁷ Judge Learned Hand points out in that case

tially in a single State and the acquisition has been authorized by the State commission of that State.

Section 10 (f) provides that the S. E. C. shall not approve the acquisition of securities or utility assets unless it appears to the satisfaction of the S. E. C. that applicable State laws have been complied with, except where compliance with State laws would be detrimental to carrying out the provisions of Section 11.

⁷ In that case, the Court of Appeals affirmed a district court order enforcing a plan, which had been approved by the S. E. C., for compliance by a New York public-utility company with the provisions of Section 11 (b) (2). One of the provisions of that plan provided for the reclassification of the outstanding securities and the issuance of new securities by the public utility involved. The New York Public Service Commission refused to permit the issuance of these new securities and contended that as a consequence the plan could not be consummated. It placed strong reliance upon the provision of Section 7 (g) of the Act that the S. E. C. shall not permit a declaration regarding the issuance of a registered holding Company to become effective if the S. E. C. is advised by a State

9

(166 F. 2d at 787): "A proceeding under § 11 (b) by the Commission itself would obviously be free from control by local state commissions * * *"

Louisiana Power refers to the fact that the S. E. C. has granted an exemption, pursuant to the provisions of Section 3 (a) of the Act, to the Northern States Power Company system which operates both electric and gas properties (Br. 16). There, however, the Commission explicitly stated (*Northern States Power Co., Holding Company Act* Release No. 12655 (1954), pp. 7-8):

Under Section 11 (b) (1) of the Act a gas system may be retained with an electric system only if the standards of Clauses (A), (B) and (C) of that section are met. However, Congress did not impose a mandate on this Commission to withhold exemptions in all cases of combined gas and electric operations merely because the retention of a combined system under strict application of Section 11 (b) (1) may in some cases require divestiture. [Emphasis added.]

commission that State laws with respect to such issue and sale have not been complied with. In rejecting this contention, the Court of Appeals stated (166 F. 2d at 787) that the requirements of Section 11 (b) are "an end whose realization the Act affirmatively prescribes" and that "[t]his once understood, it becomes to the highest degree unlikely that Congress should have set up a system of dual control over the fulfillment of this purpose; for it is scarcely necessary to expatiate upon the obvious defect of so organizing any official control * * *" The opinion also stated (at 788) that it is "incredible" that Section 7 (g) would be a limitation upon the action of the S. E. C. in fulfilling its duties to effectuate compliance with Section 11 (b).

It obviously cannot be argued on the basis of that case that the standards of Section 11 (b) (1) are not applicable in a proceeding under Section 11 (b) (1).

Louisiana Power also refers to Section 8 of the Act and its legislative history (Br. 16, 21). That section, as finally enacted,⁸ deals solely with restrictions upon *future* acquisitions which might be contrary to State policy and does not relate to the permitted *retention* of *existing* combinations of non-related operating properties.⁹ If Section 8 has any bearing upon Section 11, it is only to emphasize the opposition of Congress to control under a single holding company of gas and electric utilities, so much so that even if, under the standards of Section 11 (b) (1), a gas property could otherwise be acquired by a system operating electric properties, it would not be permitted if such acquisition were contrary to state policy.

⁸ The legislative history noted at footnote 6 on page 21 of the brief of Louisiana Power relates to a draft of Section 8 as reported by the Senate Committee on Interstate Commerce, and not as finally enacted by the Congress. Among other things, the bill to which this legislative history⁹ is applicable provided in Section 8 that the joint ownership of electric and gas properties by a subsidiary of a registered holding company might be *retained* only if the state commission approved such retention. In the bill as finally enacted, that provision was deleted.

⁹ See *Columbia Gas & Electric Corp.*, 8 SEC 443, 462-463 (1941).

CONCLUSION

For the foregoing reasons and the reasons stated in our principal brief, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.

THOMAS G. MEEKER,
General Counsel,

DAVID FERBER,
Assistant General Counsel,

SOLOMON FREEDMAN,
Assistant Director,
Division of Corporate Regulation,

JOSEPH B. GILDENHORN,
Attorney,
Securities and Exchange Commission.

APRIL 1957.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC.,
AND LOUISIANA POWER & LIGHT COMPANY.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.

**BRIEF OF LOUISIANA PUBLIC SERVICE
COMMISSION, RESPONDENT, IN OPPOSITION.**

ROBERT A. AINSWORTH, JR.,
Counsel for Respondent,
Louisiana Public Service Commission,
1650 National Bank of Commerce Bldg.
New Orleans 12, Louisiana.

Of Counsel:

Ainsworth & Ainsworth.

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On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.

**BRIEF OF LOUISIANA PUBLIC SERVICE
COMMISSION, RESPONDENT, IN OPPOSITION.**

The Louisiana Public Service Commission, (the Louisiana Commission) an official agency of the State of Louisiana,¹ domiciled in Baton Rouge, opposes the granting of the writ of certiorari to review the judgment of the U. S. Court of Appeals for the Fifth Circuit, entered herein on June 30, 1956.

¹ Louisiana Constitution, 1921, Article VI, Section 4; Louisiana Revised Statutes 1950, Title 45, Section 1161, et seq.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. A of Petition, pp. 25-35) is officially reported at 235 F. (2d) 167. The Securities and Exchange Commission (the S. E. C.) findings and opinions are unreported; that of September 13, 1955 is found at R. 110, and of March 20, 1953 at R. 74.

JURISDICTION.

The jurisdictional requisites set forth in the petition.

QUESTIONS PRESENTED.

1. Whether the action of the S. E. C. in its order of September 19, 1955, declining to revoke or modify its order of March 20, 1953, is reviewable by the Court of Appeals on a showing that conditions on March 20, 1953, or subsequent thereto, upon which the order was predicated do not exist, where the provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935 (the Act) specifically authorize the S. E. C. to "revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist", and also provide that "Any order made under this subsection shall be subject to judicial review . . ."

2. Whether the "loss of substantial economies" referred to in Section 11 (b) (1) (A) of the Act, that would result by the forced divestiture from the single integrated public utility system of a registered holding company of an additional system, applies solely to the additional system or to both the principal and additional systems; if to the additional system only, must the loss

of substantial economies cause such serious economic impairment to it as to render it incapable of independent economic operation.

3. Whether a State Commission, charged with the duty of regulating public utilities and of fixing reasonable and just rates for the services thereof, shall be allowed to present evidence against the forced separation by the S. E. C. of the electric and gas systems of a large public utility serving 65,000 gas customers, and 187,000 electric customers, all of whose physical properties, both electric and gas, being located in that State, where there will be a loss of economies to the electric and gas customers of \$957,193 annually, the separation being opposed not only by the Louisiana Public Service Commission as against the public interest, but also by the Governor of the State, the officials of 28 of the 30 towns and communities served, and of 14 of the 15 parishes (counties) served.²

STATEMENT.

Pursuant to its notice dated January 29, 1953, the S. E. C. held a hearing on February 19 and 20, 1953 and thereafter, in its order of March 20, 1953, issued under the provisions of Section 11 (b) (1) of the Act, directed *inter alia*, that Middle South Utilities, Inc., (Middle South) a registered holding company, and its subsidiary, Louisiana Power & Light Company (Louisiana Power) dispose of the non-electric properties of Louisiana Power consisting primarily of gas properties. The S. E. C. found that Louisiana Power could not retain its gas properties with its electric utility system because divestment of the

² The officials of the two towns and one parish who originally did not concur with the Commission's position, have now withdrawn from further disagreement.

gas properties would not cause such a "loss of substantial economies" as to satisfy what it found to be the requirements of the clause (A) proviso of Section 11 (b) (1).

On June 16, 1953, the Louisiana Commission issued its general order prohibiting public utility companies under its jurisdiction from disposing of utility properties subject to its jurisdiction without its consent. (See Exhibit K attached to Offer of Proof, Document No. 91).

On November 10, 1954, Louisiana Power and the Louisiana Gas Service Corporation filed a joint application-declaration with the S. E. C., proposing that the newly incorporated Louisiana Gas Service Corporation acquire all the non-electric properties of Louisiana Power. A similar application was filed at the same time by Louisiana Power with the Louisiana Commission. Thereupon, on December 22, 1954, the Louisiana Public Service Commission telegraphed the Secretary of the S. E. C. requesting that a public hearing be ordered on Louisiana Power's said joint application-declaration and that the original case, on which the order of March 20, 1953, was predicated, be reopened and set for further hearing at the same time for the purpose of receiving additional evidence (R. 51, 52). On December 27, 1954, Louisiana Public Service Commission filed its petition with the S. E. C. requesting that it be afforded the opportunity of presenting further evidence on these matters (R. 53, 55). The Louisiana Commission also filed a supplemental petition on January 3, 1955 (R. 57, 58). Attached to the supplemental petition was a letter from the President of Louisiana Power advising the S. E. C. that it had no objection to the reopening of the proceedings (R. 60).

The S. E. C. determined that before ruling on the petition to reopen the record it should have a more complete understanding of the basis for the petition in the form of an Offer of Proof with supporting brief (R. 61). Accordingly, the S. E. C. advised the Secretary of the Louisiana Commission by letter of January 21, 1955, that it would entertain such an Offer of Proof and brief, suggesting that the Offer should set out in reasonable detail the facts which the Louisiana Commission would seek to prove to establish changed circumstances supporting a modification of the order and any other facts which "you deem relevant and will seek to establish. In the brief you can submit your arguments for reopening the record" (R. 62, 63). On May 16, 1955, the S. E. C. issued its "Notice of Filing of Petition to Open Record in Previous Proceeding and to Hold Public Hearings in Respect of Opened Record and on Pending Applications and Declarations". The notice is somewhat detailed; it states the situation with respect to the background of the case, to the position of the Louisiana Commission, contains a description of the material filed by the Louisiana Commission in support of its position, and invites Middle South and Louisiana Power and any other interested person to file statements in support of or in opposition to the position of the Louisiana Commission; likewise, a date for oral argument was fixed (R. 64-73).

The Louisiana Commission's Offer of Proof was the result of an extensive study commenced in January, 1955, by its experienced staff of public utility investigators requiring more than three months to complete. It presented a complete separation study to show what the expense of operating the gas properties as a sep-

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Respondents.

BRIEF OF RESPONDENT, LOUISIANA POWER &
LIGHT COMPANY, IN OPPOSITION TO PETI-
TION FOR WRIT OF CERTIORARI.

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
MALCOLM L. MONROE,
ANDREW P. CARTER,
1424 Whitney Building,
New Orleans, La.,
Attorneys for Respondent,
LOUISIANA POWER &
LIGHT COMPANY.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

**LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC. AND
LOUISIANA POWER & LIGHT COMPANY,**
Respondents.

**BRIEF OF RESPONDENT, LOUISIANA POWER &
LIGHT COMPANY, IN OPPOSITION TO PETI-
TION FOR WRIT OF CERTIORARI.**

Respondent, Louisiana Power & Light Company, respectfully urges that the petition for certiorari of the Securities and Exchange Commission be denied for the following reasons:

(a) No question of Federal law of sufficient significance to warrant the granting of the writ is presented.

(b) No conflict between decisions of Circuit Courts is here involved.

(c) The order of the Court of Appeals sought to be reviewed is not a final judgment.

(d) Compliance by the Securities and Exchange Commission with the order of the Court below will impose no burden on the S.E.C. not already imposed by statute.

(a)

No question of Federal law of sufficient significance to warrant the granting of the writ is presented

Although the issues decided by the Court below are quite vital to Respondent, nevertheless, at this stage in the enforcement of the Public Utility Holding Company Act, the issues would not appear to have any wide applicability to others. Although the S.E.C., in its petition, conjures up many imagined dangers, it has been unable to cite a single instance in which other holding companies or subsidiaries have, since the application filed by the Louisiana Public Service Commission on December 27, 1954, actually filed a petition to reopen proceedings on this same ground. The decision of the Court of Appeals was rendered on June 30, 1956, and surely, if the issues decided had important application in other situations, petitions for reopening would have been filed by this time. Since the filing of the Commission's petition and since the decision in the Court below, Respondent has been unable to find any discussion of the issues there raised, and later decided, in any legal periodical. Surely, if the issues decided had presented important Federal questions, there would have been considerable discussion in the utility industry and among the members of the Bar.

(b)

***No conflict between decisions of Circuit Courts
is here involved***

The Fifth Circuit Court, in its decision, expressly states that it is not disagreeing with the decision in the *Engineers* case and the *Philadelphia* case, and it is submitted that a careful comparison of the instant case with those cases will show that this decision of the Court below does not conflict with either case.

(c)

***The order of the Court of Appeals sought to be
reviewed is not a final judgment***

The Court of Appeals simply remands the case to the S.E.C. with the instruction that it take into consideration evidence to be offered by the Louisiana Commission. When that has been done and the record is then complete, all the issues passed on by the Court of Appeals may then be reviewed by this Court with the entire record before it. *Stern & Glissman, Supreme Court Practice, 2nd Edition* p. 130.

(d)

***Compliance by the Securities and Exchange
Commission with the order of the Court below
will impose no burden on the S.E.C. not already
imposed by statute***

The S.E.C., in its petition, complains that to require it to take evidence as to whether there has been any actual substantial loss of economies is unduly burdensome. Respondent feels that it is justly aggrieved when it is ordered to dispose of some \$11,000,000 of gas prop-

erties without the S.E.C. even going into the question of fact of loss of economies, or taking into consideration evidence offered by an impartial, responsible Public Service Commission having jurisdiction over rates, on the ground that to do this would be burdensome on it. The Act places squarely on the S.E.C. the burden of determining whether there are any losses of substantial economies when this question is placed at issue, and it comes with ill grace for the S.E.C. to complain that it is too much trouble to carry out its duties imposed by law. It is Respondent's appreciation of the administrative process that it is peculiarly designed for investigations such as that here involved, namely, the determination of facts as to the loss of substantial economies.

In contrast to the position taken by the S.E.C., the Louisiana Commission has caused its staff to make a detailed study of the effect of the separation of the gas properties of Respondent on the consumers in Louisiana, and has concluded that such separation would result in loss of substantial economies, which would be to the great disadvantage of the ratepayers in Louisiana. All of Louisiana Power's operations, both gas and electric, are wholly within the State of Louisiana, and all of its retail rates are subject to regulation by the Louisiana Commission, except its service in a portion of the City of New Orleans, which constitutes a very small part of its operations. The Louisiana Commission, which is an elective Commission, is therefore the Commission primarily concerned. The Securities and Exchange Commission does not even have jurisdiction of the regulation of Respondent's wholesale rates in interstate commerce, since these are subject to regulation by the Federal Power Commission.

Nowhere does the Petitioner point out any evils to be cured, evils to be exorcised, or compensating advantages to result from the segregation of the gas properties.

WHEREFORE, Respondent, Louisiana Power & Light Company, respectfully prays that the writ applied for be denied.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
MALCOLM L. MONROE,
ANDREW P. CARTER,
1424 Whitney Building,
New Orleans, La.,
Attorneys for Respondent,
**LOUISIANA POWER &
LIGHT COMPANY.**

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing brief has been served by depositing same in the United States mail, with air-mail postage prepaid, addressed to counsel of record for petitioner as follows:

• Solicitor General,
Department of Justice,
Washington 25, D. C.

Thomas G. Meeker,
General Counsel,
Securities and Exchange Commission,
Washington, D. C.

Securities & Exchange Commission,
Attn: Orval L. Dubois, Secretary,
Washington, D. C.

Monte M. Lemann

October 26, 1956

arate unit would be. It showed that there would be a loss of substantial economies and additional cost to the rate-payers of Louisiana Power, which would result from the separation of the electric and gas systems, totalling \$957,193 per year, of which \$684,377 would be lost in the operation of the electric system (thereby increasing the cost to the electric customers in said sum), and \$272,816 would be lost to the gas system (thereby increasing the cost to the gas customers in said sum). The analysis was based on a study of operations of Louisiana Power covering the year 1954. The Louisiana Commission attached to its Offer of Proof the opposition of the principal governmental officials of Louisiana, including the Governor of the State, officials of 28 of the 30 towns and communities served, and of 14 of the 15 parishes (counties) served by Louisiana Power.³

On July 7, 1955, a full and complete five-hour oral argument before the S. E. C. occurred in Washington, with minute consideration of the evidence and offer of proof, by counsel for the Louisiana Commission, the S. E. C. Staff, and the S. E. C. itself, resulting in the September 19, 1955 order. The Louisiana Commission, having been denied relief, sought a review of the order in a petition to the Court of Appeals for the Fifth Circuit. The divestiture by Louisiana Power of its gas properties has not yet occurred, and the Louisiana Commission is here doing everything in its power to prevent it, because it knows there will be a resulting increased cost to the customers of Louisiana Power of at least \$957,193 annually, and because it knows the situation will be unique in Louisi-

³ See Document No. 91, 92.

ana, for no other public utility in the State has been required to separate its gas and electric properties.

REASONS FOR DENYING WRIT.

The writ of certiorari prayed for by petitioner should be denied because (1) the decision below is correct, and (2) this is not a case justifying the granting of such a writ because (a) there is no conflict between decisions of Courts of Appeal, (b) no important question of Federal law is involved, and (c) these proceedings are at an interlocutory stage and review by this Court is not proper until the proceedings have been completed.

ARGUMENT.

1. The decision below is correct.

The Court of Appeals for the Fifth Circuit considered the questions presented in the Petition herein. It found that the order of September 19, 1955 is reviewable. The Court said (App. A of Petition, 28, 29) :

"The order here involved is not of the type dealt with in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, but is an order based on a procedure specifically authorized by Section 79k (b) of the statute. This provision was availed of by the petitioner here by requesting that the record be reopened. The fact that the Securities and Exchange Commission considered the petition, suggested that petitioner file an offer of proof, considered the proof thus offered, and made a specific finding that 'no grounds for questioning our earlier conclusion . . . have been indicated'

demonstrates that the Commission considered this procedure as a petition to modify the earlier order. The order denying this request is expressly reviewable."

See also *Bowman v. Loporena*, 311 U. S. 262 (1940) where the Court allowed the filing, and after considering the merits, denied a petition for rehearing, but such consideration extended and enlarged the period for appeal. Also *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144 (1942).

The procedure provided in Section 11 (b), under which the S. E. C. is expressly authorized to revoke or modify any order previously made under the subsection, and which provides for a review of "any order" made under this subsection, is an expressly provided means to prevent a separation of utility systems not warranted by the law or the facts. The forced separation of public utility systems provided for in the subsection is a severe and drastic provision, and the statute has wisely provided for revocation or modification of any order thereunder where the conditions warrant it.

The Court below also considered the S. E. C. construction of the provisions of Section 11 (b) (1) (A), that revocation or modification of an order under this section, upon a showing that "the conditions upon which the order was predicated do not exist", does not relate to a situation where there has been no change in conditions since the entry of the original order. The Court of Appeals held (App. A of Petition, 29, 30):

"The action of the Securities and Exchange Commission here indicates that it considered that it had the duty to consider the proof that related to the conditions that existed as of the time the earlier order was entered. The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order. The language is susceptible of the construction, however, that if, in fact, it can be shown that the conditions on which the order was predicated were not truly the actual conditions, then a modification may be sought and obtained. We hold that such modification may be based on the facts as they existed at the time of the order which is to be modified."

No inference can be drawn in support of the S. E. C. theory from its citation of *Central & Southwest Utilities Co. v. S. E. C.*, 136 F. (2d) 273-275. The case is not in point. There is likewise no support to the S. E. C. construction in *American Power & Light Co. v. S. E. C.* 329 U. S. 90, 121. The issue of whether or not changed conditions would be necessary to justify a modification or revocation under the section of the Act was simply not considered in the cited cases. Nor should the Court of Appeals be precluded from overruling earlier legal determinations by the S. E. C. in this case where they are clearly erroneous.

The S. E. C. construction that "loss of economies" relates (a) only to the additional system and (b) must be of such a nature as to cause such a serious economic impairment of the additional system that it would render it incapable of economic operation, was likewise considered by the Court of Appeals, which held (App. A, pp. 31, 32) :

"We think that the language of a statute should be construed, if possible, by taking the usual intendment of the words without reference to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear.

"Giving to the language of Section 79k (b) the meaning normally attributed to the words used, we think it quite clear that if, in fact, there is a loss of substantial economies either to the separated utility or to the parent company, then the proviso in clause A is satisfied, for in such event it is clear that 'each of such additional systems (here the gas system) cannot be operated without the loss of substantial economies (to the parent company) which can be secured by the retention of control by such holding company of such system.' Since the term 'loss of substantial economies' is not expressly restricted in the statute to the economies relating to the operation of the additional companies, but is in terms broad enough to include the loss of substantial economies to the holding company as well, it would require judicial legislation for the court to cut it down as contended for by the Securities and Exchange Commission".

The Court below also said, (App. A, pp. 32, 33) :

"We do not make any findings here contrary to those arrived at by the Securities and Exchange Commission. We do decide that in making its findings on the crucial question of loss of substantial economies the Securities and Exchange Commission refused to give weight to important facts which, if as alleged by petitioner, would have presented an entirely different picture."

As to the S. E. C. contention that the losses must cause such serious economic impairment of the additional system as to render it incapable of independent economic operation, the Court of Appeals interpreted the term "substantial economies" to mean "important economies", as was said in *North American Company v. S. E. C.*, 133 F. (2d) 148, 152. The Court found the S. E. C. concept as to what constituted "substantial economies" was "too rigid", and it held (App. A of Petition, p. 34) :

"The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses."

The case was remanded to the Securities and Exchange Commission for its further consideration in the light of the opinion of the Court. We respectfully submit that this is where the case should go and the evidence be taken.

2. This is not a case justifying the granting of a writ because:

(a) There is no conflict between decisions of Courts of Appeal.

An attempt is made here to fit this case into a conflict of decision on the same points of law between the Courts of Appeal for the District of Columbia and the Fifth Circuit. The petition cites *Philadelphia Co. v. S. E. C.* 177 F. (2d) 720 (C. A. D. C.) and *Engineers Public Service Co. v. S. E. C.*, 138 F. (2d) 936 (C. A. D. C.) wherein that Court of Appeals said, at page 725, "We cannot say the Commission's understanding of the term, 'substantial economies' is wrong. We construed it similarly in the Engineers case." The Court of Appeals in the instant case held, however, on the question of whether losses of economies must be such as render the segregated system incapable of independent operation (App. A of Petition, pp. 33, 34):

"We think neither case accepts the contention of the Securities and Exchange Commission that the words 'substantial economies' must be so construed. The Engineers Public Service Co. case says 'substantial economies must mean, as was said in *North American Company v. S. E. C.* (2nd Cir.) 133 F. (2d) 148, 152, 'important economies.' 'To be sure there was a dissent in which Judge Soper, who wrote the opinion, favored a reversal of the order of the Securities and Exchange Commission because he thought the undisputed facts constituted a showing of 'substantial economies.' The majority merely felt that the evidence was

not conclusive, and therefore declined to reverse the finding of the Commission. There was no specific holding by the court that the Commission's formula as to what was meant by 'substantial economies' was universally applicable. Much the same is true of the later decision in the Philadelphia Company case. There the court affirmed an order of the Securities and Exchange Commission, in which its limiting formula had been applied. The court there said 'substantial' is a relative and elastic term.' In the context of the particular case, the court then said: 'We cannot find the Commission's understanding of the term 'substantial economies' is wrong,'"

It is certain from reading the opinion in the Philadelphia Co. case, *supra*, that it was decided by the Court of Appeals for the District of Columbia solely on the basis of the facts presented, the court holding that it "could not review or reweigh the evidence beyond determining that the finding does or does not appear to be unreasonable." (p. 724). And at page 725, the Court said that, "Even if the Commission had set up an erroneously high standard of proof, no prejudice would have resulted, for the Commission did not think petitioner's case proved by any standard however low."

The Court will look in vain in the *Engineers* decision for language to support the S. E. C. view that the losses must cause a serious economic impairment of the system such as to render it incapable of independent economical operation.

There is no conflict between the two Courts of Appeal on this question of law, as we have pointed out. At

best, the language in the *Philadelphia* case is dictum, because the Court in that case pointed out (p. 725, footnote 23) that the S. E. C. did not think that petitioner's case had been proved or that the evidence and facts supported petitioner's claims but fell far short of establishing that substantial economies would be lost on segregation. It found that the principal witness' studies were entitled to little or no weight. Thus the case was decided on its particular facts, which are greatly at variance with the facts in the present case.

Nor is it true that the *Philadelphia Company* and *Engineers* cases are in conflict with the present case on the question of whether loss of substantial economies must relate only to the loss to the additional system sought to be retained and not to any loss of economies to the retainable principal integrated system. In the petition herein the S. E. C. states that the Court of Appeals for the District of Columbia "presumably" accepted this construction. But it cannot find any language in the decision which supports the argument, for there is none. The same is true in the *Engineers* case, where the S. E. C. in its petition states that the same Court of Appeals "appears" to have applied this construction. To the contrary, in the *Engineers* case (p. 944) the Court held that the S. E. C. could not legally permit the continued control of "Virginia Gas" by "Virginia Electric" unless it could be found from the evidence that "such continuing strength would not entail a sacrifice upon the part of the controlling utility". The Court of Appeals for the Fifth Circuit discussed the question and held (App. A of Petition, p 32):

"Neither the legislative history, if we are to consider that, nor the one court decision, relied on

by the respondent, discussed this precise point. We cannot permit our conclusion as to the correct construction of the Act to be overborne by discussion by another court of other features of the Act from which a contrary construction can at most only be inferred. This is too important a part of the section to be interpreted by such method. Furthermore, while we recognize the merit of respondent's contention that the interpretation placed on a law by the agency enforcing it is persuasive, no one will contend that it is not, after all, the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy."

It is not in every case involving an undisputed conflict that this Court will grant certiorari. Where the cases are clearly distinguishable, certiorari should not be granted. 66 Harv. L. Rev. 465, 466.

(b) No important question of Federal law is involved.

The present case has importance to the Louisiana Public Service Commission, which is attempting to save the rate-payers and customers of Louisiana Power & Light Company a considerable sum each year which would result from a segregation of the electric and gas systems. But it does not have general or important significance elsewhere. This matter should be determined and can be decided on the specific facts existing here.

Petitioner seeks to justify the granting of this writ by pointing out that there are outstanding four other un-complied with Section 11 (b) (1) orders directed to registered holding companies. Petitioner fails to point out,

however, where there is any similarity whatsoever in the facts or conditions in these cases. In fact, the S. E. C. singles out only one of these cases, namely, Eastern Utilities Associates, as having the problem of whether or not there will be a "loss of substantial economies" within the meaning of Clause (A). But the facts in the Eastern Utilities case are clearly dissimilar from those here. The argument of the S. E. C. does not apply here because the facts in the instant case and in the cited cases are different. The holding of the Court of Appeals in the present case is a holding based upon a peculiar set of facts and circumstances in the problem of "loss of substantial economies" which occurs in a separation of electric and gas systems of Louisiana Power. The reasons which led the Fifth Circuit to remand this case for further proceedings on the ground that the facts developed in such further proceedings might result in a determination that the gas properties are retainable, are not pertinent to the four cited cases.⁴

⁴ **Cities Service Company**, 17 S. E. C. 5, involved a Sec. 11 (b) (1) proceeding. There the S. E. C. had already determined that Cities must divest itself of either its utility properties or its non-utility properties, but could not retain both. Cities thereupon, on its own motion, accepted the Order of the S. E. C. and stated in its motion that "Cities has concluded not to appeal from the order entered herein and has elected to retain its oil, wholesale natural gas, and other non-utilities businesses intact. . . ." Regardless of the outcome of the instant proceedings, there could be no re-activation of the Cities Service matter.

Commonwealth & Southern Corp., 26 S. E. C. 464, was a Sec. 11 (e) proceeding (a voluntary application by the Holding Company suggesting the means of divestiture) approved by the S. E. C. Nothing therein could possibly be affected by these proceedings. **Eastern Utilities Associates**, 31 S. E. C. 329, was primarily a Sec. 11 (b) (2) proceeding. Insofar as Sec. 11 (b) (1) was pertinent, the evidence submitted by the holding company was directed

The issue here is a narrow one and on these facts the Court below was clearly right.

It is interesting to note that in the S. E. C. annual report for the year 1952, at page 82, the Commission said that, "It is now possible to state that the task of bringing about compliance with Section 11, which had its real beginning in 1940, is rapidly nearing completion."

(c) These proceedings are at an interlocutory stage and review by this Court is not merited until the proceedings have been completed.

The judgment of the Court below simply remanded this case to the S. E. C. for further proceedings, the Court stating in its opinion as quoted above:

"We do not make any findings here contrary to those arrived at by the Securities and Exchange Commission. We do decide that in making its findings on the crucial question of loss of substantial economies, the Securities and Exchange Commission refused to give weight to important facts which, if as alleged by petitioner, would have presented an entirely different picture."

primarily at speculative construction costs that separation would bring about, and secondarily to increased operating costs. As to this latter evidence, the S. E. C. found it defective and without basis. The Order was promulgated on April 4, 1950, and could hardly be the subject of reopening now. . . unless the "conditions upon which the order was predicated do not exist," in which case the matter should be reopened according to the Act.

Philadelphia Company, 28 S. E. C. 35, has been appealed to the U. S. Court of Appeals for the District of Columbia, 177 F. (2d) 720, and there affirmed. Regardless of the ultimate holding in this matter, the Philadelphia case is res judicata on its particular facts and no reopening would be available.

It would appear from the above that only the relatively small gross gas plant of Blackstone Valley Gas & Electric Company could conceivably be affected by the Fifth Circuit's decision.

The Court should not consider the writ of certiorari at this stage of the proceedings because only an interlocutory decree of the Court of Appeals is now at issue. The Petitioner cites *U. S. v. General Motors Corp.*, 323 U. S. 373, and *Land v. Dollar*, 330 U. S. 731, as authority for the granting of certiorari now. In *Land v. Dollar*, injunction proceedings were involved and it was necessary that certiorari issue to prevent irreparable damage. The facts in *U. S. v. General Motors Corp.* indicated that such a fundamental constitutional question, involving the power of the sovereign to expropriate without just compensation, was involved that it could not be cured later when the proceedings below were concluded. Generally, the cases emphasize that certiorari should not be issued to review interlocutory judgment except in extraordinary matters, and where the issue involved is not a final one it is usually sufficient ground for denial of the application for certiorari. As was said in *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372:

"Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case."

See, also, *Robertson & Kirkham "Jurisdiction of the Supreme Court of the United States"*, Sec. 130, pp. 232-234. It is submitted that all the issues, both procedural and substantive, which petitioner challenges in its petition for certiorari may be passed on by this Court on review of a final decree of the Court below.

CONCLUSION.

It is respectfully submitted that the petition for certiorari is without merit for the reasons shown herein and should be denied.

Respectfully submitted,

ROBERT A. AINSWORTH, JR.,
Counsel for Respondent,
Louisiana Public Service Commission,
1650 National Bank of Commerce Bldg.
New Orleans 12, Louisiana.

Of Counsel:
Ainsworth & Ainsworth.

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JOHN T. FEY, Clerk

IN THE

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SECURITIES AND EXCHANGE COMMISSION,

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LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE
SOUTH UTILITIES, INC., and LOUISIANA POWER
& LIGHT COMPANY.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR MIDDLE SOUTH UTILITIES, INC.

DANIEL JAMES,
Counsel for Middle South Utilities, Inc.,
63 Wall Street,

New York 5 N Y

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IN THE
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OCTOBER TERM, 1956.

No. 466.

SECURITIES AND EXCHANGE COMMISSION, Petitioner

v.

**LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH
UTILITIES, INC., and LOUISIANA POWER & LIGHT COMPANY.**

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR MIDDLE SOUTH UTILITIES, INC.

Opinions Below.

The opinion of the Court of Appeals (R. 134-142) is reported in 235 F. 2d 167. The findings, opinion and order of the Securities and Exchange Commission dated March 20, 1953 (R. 103-128) and those dated September 13, 1955 (R. 129-134) have not as yet appeared in the official SEC reports, but have been published as SEC Holding Company Act Releases Nos. 11782 and 12978, respectively.

Jurisdiction.

Jurisdiction of this Court was invoked under 28 U. S. C. §1254(1). Certiorari was granted December 3, 1956 (R. 144), 352 U. S. 924.

Question Presented.

The question at issue between the Securities and Exchange Commission (herein called the SEC) and Middle South Utilities, Inc., and the only question dealt with by this brief, is whether the SEC is correct in its contention (SEC brief, p. 47, n. 47) that the court below erred in providing in its opinion as follows (R. 142):

“The further consideration to be given to this matter by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric [Light] Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order.”

Summary of Argument.

The substantial question at issue between the Public Service Commission of Louisiana and the SEC is whether the gas properties of Louisiana Power & Light Company should be disposed of by that company. Louisiana Power & Light Company is an operating company in the Middle South system, which has been determined by the SEC to be an “integrated public-utility system” under the Public Utility Holding Company Act of 1935 (herein called the Act*). No appeal was taken from that determination within the time allowed for appeals. The SEC contends that if it is to consider the retention of the Louisiana gas properties, it must reopen the whole question of whether or not the Middle South system constitutes an integrated public-utility system under the Act. Middle South Utilities, Inc. disagrees.

The argument of Middle South Utilities, Inc., in brief, is that, although the gas properties of Louisiana Power & Light Company are important to it, they constitute a relatively unimportant part of the properties of the Middle South system and produce a relatively small part of its operating revenues; that the investments of tens of thousands of stockholders of Middle South Utilities, Inc., who look to the Middle South system as a system for income on their investments, should not be put at hazard merely in order to determine a question respecting these gas properties; and that the retainability of these gas properties can and should be determined without jeopardizing the integrity of the Middle South system integration order.

POINT I.

It is not Necessary for the SEC, in Carrying Out the Mandate of the Court of Appeals, to Reopen the Broad Question of Whether or not the Middle South System is an "Integrated Public-Utility System" Under the Act.

Middle South Utilities, Inc. is a public utility holding company. It owns all the common stock of Louisiana Power & Light Company, which in turn owns the gas properties constituting the subject matter of the present appeal. Middle South Utilities, Inc. also owns all the common stock of Arkansas Power & Light Company and Mississippi Power & Light Company and 95.2% of the common stock of New Orleans Public Service Inc. (R. 104-105).

On March 20, 1953, the electric utility properties of the four operating companies in the Middle South system were held by the SEC to constitute an "integrated public-utility system" within the meaning of Section 2(a)(29)(A) of the

Act (R. 103-128, especially 115). No appeal was taken from that order and the time to appeal has expired.

The order contained the following direction (R. 128):

"IT IS ORDERED, pursuant to Section 11(b)(1) of the Act, that Middle South [Utilities, Inc.] and its subsidiaries dispose or cause the disposition of their direct and indirect ownership in the non-electric properties owned by Arkansas [Power & Light Company], Louisiana [Power & Light Company] and Mississippi [Power & Light Company] in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder."

On the application of Louisiana Power & Light Company a proceeding was commenced before the SEC in November, 1954, designed to bring about compliance by that company with the foregoing direction (SEC Holding Company Act Release No. 12740). In that proceeding the Louisiana Public Service Commission filed a petition asking the SEC to reopen the prior proceeding which led to the 1953 order and to reconsider the question of whether Louisiana Power & Light Company might retain its gas utility properties (R. 89-93). The SEC denied such request (R. 129-134) and, on a petition for review (R. 63-67), the Court of Appeals for the Fifth Circuit granted the petition and remanded the cause to the SEC for further consideration in the light of the opinion of the court (R. 134-143).

For purposes of the instant brief and to avoid repetition, Middle South Utilities, Inc. adopts the summary of the directions in the lower court's opinion set forth at pages 9 and 10 of the brief for the SEC. In general, those directions require the SEC to consider the retainability of the Louisiana gas properties in the light of standards specified by the court.

The breadth of action required of the SEC in carrying out the court's directions must be determined with reference to Section 11(b)(1) of the Act. Section 11(b)(1) says that it shall be the duty of the Commission to require holding companies to limit their operations to a single integrated public-utility system, and then continues with a proviso as follows:

“Provided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

“(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

“(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

“(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.”

It has been the consistent position of Middle South Utilities, Inc. that it is not necessary to re-examine the Middle South integrated system as a whole in order to make a determination regarding the retainability of the Louisiana gas properties, but that the only question is whether the retention of such gas properties, constituting a comparatively minor asset, would result in non-compliance with

clauses (A), (B) and (C) of Section 11(b)(1). That was the holding of the court below (R. 142).

On the other hand, the SEC takes the position (SEC brief, p. 47, n. 47) that, in order to comply with the judgment of the court below, the SEC should be free to reconsider the status of the entire Middle South system under Section 11(b)(1), thus unsettling all the issues which were set at rest after complex proceedings only four years ago (R. 103-128).

Middle South Utilities, Inc. has over 25,000 stockholders.* They look to the Middle South system as a system for the income on their investments. It is unnecessary and it would be obviously unfair after only four years to put their entire investment at hazard merely in order to decide a question relative to gas properties which constitute only 1.6% of the system's aggregate gross property account (R. 123) and produce only 3.4% of the system's total revenues (R. 125). If the decision of the Court of Appeals stands, and even if its ultimate enforcement should result in the retention by Louisiana Power & Light Company of its gas properties, the investments of the Middle South stockholders could not be disturbed, since they would be merely permitted thereby to retain their existing investments in the same properties. On the other hand, an unsettling of the entire integration order could be most unsettling to their investments. Confronted with such a threat, they are entitled to invoke the doctrine expressed and followed by this Court in *International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 340 (1945):

* Document 15, Middle South Exhibit D-14, Annual Report 1951, p. 11. This is listed at R. 69 and, although not a part of the printed record, has been lodged with this Court and may be referred to by any party in briefs or arguments pursuant to stipulation herein dated December 28, 1956.

“Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation.”

Middle South Utilities, Inc., therefore, is opposed to any modification of the judgment below which would reopen the entire case under Section 11(b)(1) of the Act as it applies to the Middle South system as a whole.

Conclusion.

This appeal should be disposed of by affirming the judgment below without modification or by other disposition of the appeal which will not impair the integrity of the SEC integration order of March 20, 1953 (R. 127-128).

Dated: April 18, 1957.

Respectfully submitted,

DANIEL JAMES,
Counsel for Middle South Utilities, Inc.

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APR 23 1957

JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
versus

LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC., and
LOUISIANA POWER & LIGHT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit.

**BRIEF OF LOUISIANA PUBLIC SERVICE
COMMISSION, RESPONDENT.**

ROBERT A. AINSWORTH, JR.,
Counsel for Respondent,
Louisiana Public Service Commission.

Of Counsel:

AINSWORTH & AINSWORTH,
1650 National Bank of Commerce Building,
New Orleans, Louisiana.

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COMMISSION, RESPONDENT.**

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 134) is officially reported at 235 F. (2d) 167. The Securities and Exchange Commission findings and opinions are unreported; that of September 13, 1955 is found at R. 129, and of March 20, 1953 at R. 103.

JURISDICTION.

Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1); writ of certiorari having been granted on December 3, 1956 (R. 144) to the U. S. Court of Appeals (5th Circuit) decision of June 30, 1956 (R. 134).

QUESTIONS PRESENTED.

1. Whether judicial review shall be permitted of an order of the Securities and Exchange Commission denying a petition of the Louisiana Public Service Commission seeking to revoke or modify a prior S. E. C. order which directed a public utility to dispose of ownership of its non-electric properties under the provisions of the Public Utility Holding Company Act,

a) Where the provisions of Section 11 (b) of the Act authorized the S. E. C. by order to revoke or modify any order previously made if "it finds that the conditions upon which the order was predicated do not exist",

b) Where Section 11 (b) also provides that "Any order made under this subsection shall be subject to judicial review as provided in Section 24", and

c) Where the Louisiana Public Service Commission, a State regulatory body, petitioned the S. E. C. for revocation or modification, alleging that the conditions at the time of and subsequent to the prior S. E. C. order do not exist, and has sought judicial review of the S. E. C. order refusing to revoke or modify its prior order.

2. a) Whether the "loss of substantial economies", referred to in Section 11 (b) (1) (A) of the Act, and necessary to permit a registered holding company to continue to control one or more additional integrated public utility systems, refers solely to the additional systems or to the principal system as well.

b) Whether the "loss of substantial economies" must cause such serious economic impairment to the public utility systems to be divested as to render them incapable of independent economical operation.

STATUTE INVOLVED.

The Public Utility Holding Company Act of 1935, and Sections 11 (b) and 24 (a) thereof. (15 U. S. C. 79k (b) and 79x (a)).

STATEMENT.

This case involves the petition of the Securities and Exchange Commission to review the decision of the U. S. Court of Appeals for the Fifth Circuit, decided June 30, 1956, which remanded this proceeding to the S. E. C. for further consideration consistent with the opinion of the

Court (R. 142). The matter first reached the courts on the petition for review filed by the Louisiana Public Service Commission under the provisions of Sections 11 (b) and 24 (a) of the Public Utility Holding Company Act. The Louisiana Commission is an official agency of the State of Louisiana, provided for by the State Constitution¹ and statutes,² with all necessary power and authority to regulate both electric and gas utility companies operating in Louisiana. It is composed of three commissioners, who are

¹ Article 6, p. 4, Constitution of 1921, provides:

"P. 4. Powers and duties of Service Commission.—The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls and charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts."

² Louisiana Revised Statutes, 1950, Title 45, section 1161 et seq.

elected from the three public service districts of Louisiana for six-year overlapping terms.³

The S. E. C. here is seeking and has ordered divestiture by Louisiana Power and Light Company of its non-electric properties, consisting principally of gas properties. The matter, therefore, involves a conflict between two governmental regulatory agencies, the Securities and Exchange Commission on the one hand, and the Louisiana Public Service Commission on the other. The federal agency, the S. E. C., is attempting to accomplish what it has set up to be the objectives of the Public Utility Holding Company Act in this case; the state agency, the Louisiana Commission, is attempting to save the rate payers of a large public utility company in Louisiana, operating wholly within that State, from additional costs of nearly one million dollars a year, which would result if Louisiana Power's electric and gas systems were separated and the gas properties disposed of to a new company.

The Louisiana Commission's position in this case is based on the Section 11 (b) (1) (A) (B) (C) provisions of the Public Utility Holding Company Act, which provide the conditions under which a registered holding com-

³ Article 6, p. 3, Constitution of 1921, provides in part as follows:

"P. 3. Public Service Commission—Election—Salary and traveling expenses.—There is hereby created a Commission, to be known as the Louisiana Public Service Commission, which shall be composed of three members, who shall be duly qualified electors, to be elected from the district hereinafter named, at the time fixed for the Congressional elections.

"The three members of the Railroad Commission of Louisiana in office upon the adoption of this Constitution shall be the members of the Louisiana Public Service Commission and shall serve out the terms for which they were respectively chosen. Upon the expiration of the term of each commissioner his successor shall be chosen for a term of six years."

pany may continue to control one or more additional integrated public utility systems.

The chronological sequence of events follows:

On January 29, 1953 the S. E. C. issued its notice convening a hearing pursuant to Section 11 (b) (1) of the Act to decide, among other things, "Whether Middle South and Louisiana should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana and, if so, what terms and conditions should be imposed in connection therewith." (R. 106). The order directed that the hearing be convened on February 19, 1953. Accordingly a hearing was held on February 19 and 20, 1953, approximately three weeks after the date of the notice.⁴

On March 20, 1953, the S. E. C. issued its order under the provisions of Section 11 (b) of the Act, directing Louisiana Power to dispose of its non-electric properties, consisting primarily of gas properties. In its order, the S. E. C. held that, "The general framework of the Act as well as its legislative history demonstrates the intention of permitting the retention of additional systems only where such additional system is so small that it could not operate economically under separate management" (R. 116). Also, "For the loss of economies to be 'substantial' they must

⁴ Earlier, on March 7, 1949, the S. E. C. had issued its order under Section 11(a) of the Act, approving a plan for the dissolution of Electric Power and Light Corporation, a registered holding company, under which a new holding company, Middle South, was created which acquired the common stocks of several public utilities, including Louisiana Power (R. 104, 105). Jurisdiction was reserved at that time to make definitive findings under Section 11 of the Act with respect to the retainability of the non-electric properties, and to institute and conduct such further proceedings under Section 11 (b) of the Act as might be necessary or appropriate (R. 105).

be 'important' in the sense that they are of such magnitude as to cause a serious economic impairment of the system." (R. 117).

Finally in its order, the S. E. C. released jurisdiction with respect to the Section 11 problems of Middle South, and retained jurisdiction only to carry out the terms of the order (R. 128).

On June 16, 1953, the Louisiana Commission issued a general order prohibiting public utility companies under its jurisdiction from disposing of utility properties subject to its jurisdiction without its consent.⁵

⁵ Offer of Proof, Exhibit K (R. 44, 45). The Louisiana Commission general order reads as follows:

"At a session of the Louisiana Public Service Commission held at its offices in Baton Rouge, Louisiana, on June 9, 1953, certain questions arose as to the degree of control which this Commission should exercise over sales, leases, mergers, consolidations, and changes of control of public utilities subject to its jurisdiction.

"The Commission having been vested by the Constitution of 1921 with all necessary power and authority, among other things, to supervise, govern, regulate and control all street railroads, telephone, telegraph, gas, electric light and power, water works, and common carrier pipe lines, hereby recognizes the present ownership of every such public utility now coming under its jurisdiction in accordance with annual reports on file with this Commission for the year ended December 31, 1952, or for such fiscal year ended in 1952 as may be applicable.

"The attention of the Commission has been called to the fact that utility systems have, in the past, been sold or otherwise effected change of ownership or control without authority and without the knowledge of the Commission or any member of its staff until after such sale or change of ownership has been consummated, and it is hereby:

"Ordered, that from the date of this order, the sale, lease, merger, consolidation, or other change in the ownership of the assets of public utilities or any controlling part thereof subject to the jurisdiction of the Commission is hereby prohibited without first having obtained an order of authority from the Commission for such change in ownership."

On November 10, 1954, Louisiana Power and Louisiana Gas Service Corporation filed a joint application-declaration with the S. E. C., proposing that the newly-incorporated gas service corporation acquire all the non-electric properties of Louisiana Power. Simultaneously therewith a similar application was filed by Louisiana Power and Louisiana Gas with the Louisiana Public Service Commission.

On December 22, 1954, the Louisiana Commission telegraphed the Secretary of the S. E. C., requesting that a public hearing be ordered in the matter of the Louisiana Power and Louisiana Gas joint application, and that the original case, on which the order of March 20, 1953 was predicated and which ordered Louisiana Power to divest itself of its non-electric properties, be reopened and set for further hearing at the same time for the purpose of receiving additional evidence (R. 89).

On December 27, 1954, the Louisiana Commission filed its petition dated December 23, 1954 with the S. E. C. in which it alleged that the hearing heretofore held in the matter, "did not elicit the existing facts and information which would have demonstrated that the indicated divestiture of gas properties by Louisiana Power & Light Company is not in the public interest; that the retention of these gas properties by Louisiana Power & Light Company would bring about substantial economies of such a nature as to justify the retention of such properties; that the separation of such properties would lead to increased cost of gas to the consumers of gas in the State of Louisiana and should not be consummated; and that an opportunity should be afforded petitioner by the reopening of these matters and the record therein for the reception of further

evidence on the questions therein involved and relating to Louisiana Power & Light Company." (See Louisiana Commission's petition, R. 91).

On January 3, 1955, the Louisiana Commission filed a supplemental petition with the S. E. C., reiterating the allegations of its original petition and averring that since the final hearings (which were the subject of the S. E. C. order of March 20, 1953), "there have occurred substantial and important changes in the conditions and facts upon which the findings and order of this Honorable Commission were predicated in said proceedings, of such a character as, in petitioner's opinion, would have led this Honorable Commission to reach a different and contrary conclusion in these proceedings with regard to the divestiture by Louisiana Power & Light Company of its gas properties, and petitioner respectfully suggests that in the public interest evidence of such changes should be resolved and considered." (R. 92, 93).

Attached to the supplemental petition was a letter from the President of Louisiana Power advising that the company had no objection to the reopening of the proceedings (R. 93, 94).

On January 21, 1955, the S. E. C. addressed a letter to the Secretary of the Louisiana Public Service Commission which acknowledged receipt of the petition for reopening and reconsideration of its 1953 order of divestment directed against Louisiana Power. The letter stated that the Commission would entertain an offer of proof and brief; and that the offer should set out in reasonable detail the facts the Louisiana Commission would seek to prove to establish changed circumstances supporting a modification of the order and any other facts which the Louisiana

Commission deemed relevant and would seek to establish. The letter said that, "In the brief you can submit your arguments for reopening the record." (R. 95).

The S. E. C. then issued its notice on May 16, 1955, stating the situation with respect to the background of the case and the position of the Louisiana Commission, setting forth a description of the material filed by the Louisiana Commission in support of its position, and inviting Middle South and Louisiana Power and any other interested person to file statements in support of or in opposition to the position of the Louisiana Commission. It likewise set a date for oral argument before the S. E. C. (R. 96-102).⁶

⁶ The S. E. C. notice said that the pertinent portions of the Louisiana Commission's Offer of Proof and Exhibits could be summarized in part as follows:

"The offer of proof outlines six general matters which Public Service Commission would propose to establish at a public hearing in these proceedings. These six items are concerned primarily with the following considerations: (i) on the basis of a separation study of Louisiana Power for the year 1954 prepared by the members of the staff of Public Service Commission which allegedly '... shows that the total additional cost of such separation to Louisiana (Power's) utility customers would be \$957,000 of which \$684,337 would be additional cost to Louisiana (Power's) electric customers, (and) \$272,816 would represent additional cost to the non-electric customers,' the gas system of Louisiana Power cannot be operated as an independent system without the loss of substantial economies; (ii) the electric and gas systems of Louisiana Power are located entirely within the State of Louisiana; (iii) the continued combination of such systems will not impair the advantages of localized management, efficient operation or the effectiveness of regulation; (iv) no law of the State of Louisiana prohibits the joint ownership or operation of gas and electric utility assets; (v) the public interest and the interest of consumers will best be served by the continued joint operation by Louisiana Power of gas and electric utility assets, and (vi) it is the desire of all governmental agencies of the territory served by Louisiana Power (except Jefferson Parish) that the joint operation of these properties by Louisiana Power be continued."

THE OFFER OF PROOF.

In its Offer of Proof the Louisiana Commission stated that it had heretofore exercised jurisdiction over all the retail electric rates and gas rates of Louisiana Power & Light Company for residential, commercial, industrial and governmental and municipal services; that all such rates are on file with the Commission; and that the Commission requires Louisiana and other utilities to file annual reports which show among other things the earnings for each year. It further stated that by its order dated July 29, 1946 it had fixed the electric rate base of Louisiana Power and had prescribed its allowable rate of return; that Louisiana's electric accounts are classified in accordance with the uniform system of accounts prescribed by the Commission and its gas accounts are classified in accordance with the N. A. R. U. C. system of accounts (R. 4, 5).

The Louisiana Commission further stated that the gas system of Louisiana Power cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of such system; that the electric and gas systems of Louisiana Power are located entirely within the State of Louisiana; that the continued combination of such systems under the control of the holding company is not so large considering the state of the art and the area or region affected as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation; that no law of the State of Louisiana prohibits the ownership or operation by a single company of utility assets of an electric utility and a gas utility, and that Louisiana Power has the express approval of the Louisiana Commission to con-

tinue operation of both utility systems; that the public interest and the interests of electric and gas consumers of Louisiana would best be served by the continued operation of both systems by Louisiana Power; and that it is the desire of the official governmental agencies in Louisiana concerned with the services which Louisiana Power renders that the company retain both electric and gas systems (R. 5). Attached to the Offer of Proof were numerous exhibits which were prepared "as a result of a great deal of time spent by its (the Commission) staff." (R. 6). The Louisiana Commission averred that its study showed that the total additional cost of such separation to Louisiana Power's utility customers would be \$957,193 of which \$684,377 would be additional cost to Louisiana Power's electric customers, and \$272,816 would represent additional cost to the non-electric customers. This separation study was made by taking the operations of the company for the year 1954 and eliminating from the cost of operation of the electric properties all the expenses which could possibly be eliminated during that year if the gas operations had been eliminated (R. 6). This showed the increased cost which the electric operations would have to bear. The second part of the study projected the cost of operations of a separately operated gas system. This was compared with costs actually charged to gas operations during the year.

The Louisiana Commission further pointed out that debt financing would be much more expensive for a separate gas company; that sales of natural gas are subject to great seasonal variations as are sales of electric energy; that comparing these sales it will be seen from the exhibits that the two systems operated together tend to

complement each other, which makes for a more balanced operation, and from a rate regulation point of view eliminates the necessity for the Commission giving consideration to such seasonal variations in fixing a rate of return. (R. 8, 9.)

The Louisiana Commission said that its long experience in regulating Louisiana Power has indicated, "that it is an efficient operation", and that the Commission "believes that severance of the gas properties would not improve but would impair this efficient operation;" that the Commission "has found that regulation of Louisiana in its joint operations has been very effective. Electric and gas rate reductions were put into effect on numerous occasions. No increase in electric rates has ever been granted to, or ever sought by, Louisiana, although the only other comparable electric utility company in the State has been required to effect a material general rate increase. No general gas rate increase has been put into effect by Louisiana, and the only gas rate increases granted to Louisiana have been in the exact amount of the increase in the cost of the gas purchased for resale by Louisiana." (R. 11, 12). The Louisiana Commission averred that other utilities under its jurisdiction continue to operate both electric and gas systems; that it has not found that this combined operation in any way impaired the effectiveness of the Commission's regulation of these utilities (R. 12)..

Exhibits A-I, inclusive, attached to the Offer of Proof, contained detailed analyses and cost studies made by the Louisiana Commission's staff, showing in every particular the basis upon which it alleged that total annual additional costs to Louisiana Power utility customers would amount to almost one million dollars (R. 16-42).

Attached to the Offer of Proof were letters showing the opposition to the proposed separation of the electric and gas systems of the principal governmental officials of Louisiana, including the governor of the State, officials of twenty-eight of the thirty towns and communities served, and fourteen of the fifteen parishes (counties) served by Louisiana Power (R. 45-49).

On July 7, 1955, a five-hour oral argument occurred before the S. E. C. in Washington, in which the Louisiana Commission's Offer of Proof was discussed in detail, as well as applicable authorities, by counsel for the Louisiana Commission, Louisiana Power, Middle South, and the S. E. C. Thereafter, the S. E. C. issued its order of September 13, 1955, in which it said it had considered the Louisiana Commission's Offer of Proof and the arguments relating thereto, but was of the opinion that no grounds for questioning its earlier conclusion and no changed circumstances justifying a modification of its order had been indicated. Accordingly, it declined to reopen the proceedings on which its order of March 20, 1953 was entered (R. 132).

Exercising its right under the provisions of Section 11 (b) and Section 24 (a) of the Act, the Louisiana Commission filed its petition with the U. S. Court of Appeals for the Fifth Circuit seeking a review of the S. E. C. order of September 13, 1955, and asking that said order be set aside as well as the order of March 20, 1953 (R. 63-67).

On June 30, 1956, after the usual briefs and oral argument, the Court of Appeals remanded the case to the

S. E. C. for further proceedings, having granted the Louisiana Commission's petition for review.

ARGUMENT.

Under the Constitution of Louisiana, the Louisiana Public Service Commission is vested with all necessary power and authority to supervise, regulate and control all public utilities, including gas and electric light companies. The Constitution makes it the duty of the Commission to concern itself with all matters and things concerning and growing out of the service to be given or rendered by public utilities. This regulatory authority has been exercised by the Louisiana Commission for many years, the present Commission having derived its authority from the 1921 Louisiana Constitution. The Louisiana Commission, therefore, has had broad experience at the state level in regulating the state's electric and gas utilities. It has intimate knowledge of the manner in which most public utilities in the State operate, and it is naturally concerned with the rates which are to be paid by consumers in Louisiana. Public utilities are entitled to a fair rate of return, and naturally their costs of operation are most important considerations in determining what their regulated income shall be and what rate of return shall be allowed by the Commission on their operations, as well as what the rates shall be to consumers and users of the service.

The Louisiana Commission's concern with the activities of Louisiana Power is one which it has the constitutional duty to perform, namely to keep rates to consumers in Louisiana of this company at a fair and just level.

As the Louisiana Commission said in its Offer of Proof, it has had long experience in regulating Louisiana Power, which it believes to be an efficient operation. Louisiana Power operates solely within the State of Louisiana, and the Louisiana Commission believes that separation of the gas properties from the electric properties would not improve but would impair this efficient operation. The Louisiana Commission was aware that there is no law in Louisiana which prohibits the ownership or operation by a single company of utility assets of both an electric and gas utility. Realizing, as it did, that Louisiana Power had never sought an increase in electric rates and no general gas rate increase except to the extent of increased costs of gas purchased for resale, and knowing that other public utilities under its jurisdiction continue to operate both electric and gas systems, it felt continue to operate both electric and gas systems, it felt that the proposed divestiture should not occur.

When the S. E. C. declined to permit the Louisiana Commission to present the results of its comprehensive study forming the subject of its Offer of Proof, the Louisiana Commission appealed to the courts in its official capacity on behalf of the numerous consumers and rate-payers in Louisiana. The Louisiana Commission believes that it is wholly unnecessary for the S. E. C. to require the divestiture of the gas properties by Louisiana Power, particularly when, in the belief of the Louisiana Commission these gas properties may clearly and properly be retained under the provisions of Section 11 (b) (1) (A) (B) (C). The frequent reference to the need of protecting "consumers" in the Public Utility Holding Company Act discloses also that Congress in passing the Act itself felt a

great necessity and obligation to look out for the interests of the consumers of the numerous public utilities in the nation. The Court will find numerous references in the Act to "the interest of consumers of electric energy and natural and manufactured gas". (*E. g.*, Sec. 1 (b)).

I.

Judicial Review Is Expressly Provided for Any Order of the S. E. C. Made Under Subsection 11 (b) of the Act. The S. E. C. Denial of the Louisiana Commission's Petition, Filed Under Subsection 11 (b) To Revoke or Modify Its Previous Order Requiring Louisiana Power to Divest Itself of Its Non-Electric Properties on the Ground That the Conditions Upon Which the Order Was Predicated Do Not Exist, Is, Therefore, Expressly Subject to Judicial Review.

In the Act judicial review is provided for by Section 24 (a), entitled, "Court Review of Orders". This section states that "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in a Circuit Court of Appeals of the United States. . . ." Thus an order issued by the Commission is subject to court review if the order is issued by the S. E. C. under the provisions of the Act. But Section 11 (b) restates the right of judicial review by repeating it in said section, though we may infer that mention of the right of judicial review in Section 11 (b) is unnecessary, since judicial review generally is provided for to orders of the S. E. C. by Section 24 (a). It is proper to construe the repetition of the right of judicial review which Congress placed in Section 11 (b) to mean that the right of judicial review has been emphasized, as if to say, that it may not be taken away from a person aggrieved by

an order issued by the S. E. C. under Section 11 (b). Consider the last two sentences of Section 11 (b), which read:

"The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in Section 24." (Emphasis supplied).

It is noteworthy that the sentence providing for the right to appeal to the courts immediately follows the sentence which authorizes the Commission to revoke or modify any order previously made. Congress could not have been more emphatic or lucid in stating the right of the Louisiana Commission to judicial review of an order of the Commission which declined to revoke or modify an order previously made, where the conditions upon which the order was predicated do not exist.

There is no other section in the Act which expressly provides for judicial review of an order of the S. E. C. Only Section 11 (b) contains such a provision and expressly mentions the right of judicial review in addition to that which is already provided generally under Section 24 (a). Thus, of the thirty-three sections in the Act, only Section 11 (b) has been so singled out. It can not be logically argued by the S. E. C. (brief, p. 27) that its orders may be modified only at its discretion. The language of the next following sentence of the subsection quoted

above is too clear that the right of judicial review is preserved to believe that Congress intended any such result. If it meant the S. E. C.'s discretion to be plenary and final, it would not have included the next following sentence which provides for judicial review of orders of the S. E. C. There are numerous subsections in the Act in which the S. E. C. is required to take action by order where no specific right of judicial review is spelled out but an aggrieved party is relegated to the general review provisions of Section 24 (a). (See Sec. 2 (3) (7), Sec. 8 (13)). In no other portion of the Act is the right of judicial review so clearly stated as it is in Section 11 (b), where the right to seek judicial review is expressly reserved to a party aggrieved by the action of the S. E. C. under this subsection.

Section 11 (b) contains the so-called "death sentence" provisions of the Act. The importance of the section and the drastic effects which flow from its application were well-known to Congress. We can only infer, therefore, that Congress desired that parties aggrieved by S. E. C. action under the Section should certainly have the right of judicial review. So that right was expressly stated in Section 11 (b) that there would be no misunderstanding of the legislative intent.

The S. E. C. contends (brief, p. 18) that revocation or modification can only occur, "in the light of changed circumstances". But this interpretation is based entirely on prior decisions of the S. E. C. itself and not on

judicial authority. It contends that the clause, "conditions upon which the order was predicated do not exist" does not relate to conditions at the time the order was made.

The Louisiana Commission's position is that the clause means that the conditions referred to may be either those which exist now or which existed at the time the original order was made; that the "conditions upon which order was predicated do not exist" now nor did they exist when the order was made. Had the S. E. C. not based its original order upon erroneous legal interpretations an entirely different result might have occurred when the earlier order was issued. . But the Louisiana Commission's argument and its offer of proof and supporting brief relate both to conditions at the time of and subsequent to the March 20, 1953 order of the S. E. C.

In the Louisiana Commission brief in support of its offer of proof, it said that, "Failure to take into consideration also the loss of economies in the principal electric system constitutes a shutting of one's eyes to reality". (R. 56). In its supplemental petition the Louisiana Commission alleged that, "there have occurred substantial and important changes in the conditions and facts upon which the findings and order" of the S. E. C. were predicated. (R. 92).

The Court below held that the provisions of Subsection 11 (b) were subject to the interpretation that, "if in fact, it can be shown that the conditions on which the order

was predicated were not truly the actual conditions, then a modification may be sought and obtained".⁷ (R. 138).

In a footnote to its opinion the Court below cited *American Power Co. v. S. E. C.*, 329 U. S. 90, at p. 121, which it said contains language which seems to indicate that the S. E. C. interpretation is erroneous. In the *American Power Co.* case this Court said:

"Moreover, a § 11 (b) (2) proceeding leads only to the expression of the Commission's view of what must be done to ensure compliance with the statu-

⁷ See the Court of Appeals opinion, R. 137, 138, as follows:

"We think the order of September 19 is reviewable. The order here involved is not of the type dealt with in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, but is an order based on a procedure specifically authorized by Sec. 79k (b) of the statute. This provision was availed of by the petitioner here by requesting that the record be reopened. The fact that the Securities and Exchange Commission considered the petition, suggested that petitioner file an offer of proof, considered the proof thus offered, and made a specific finding that 'no grounds for questioning our earlier conclusion * * * have been indicated' demonstrates that the Commission considered this procedure as a petition to modify the earlier order. The order denying this request is expressly reviewable.

"The Commission contends that the power to revoke or modify upon a finding that the conditions upon which the order was predicated do not exist comes into play only if a change in conditions has occurred after the entry of the earlier order. The action of the Securities and Exchange Commission here indicates that it considered that it had the duty to consider the proof that related to the conditions that existed as of the time the earlier order was entered. The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order. The language is susceptible of the construction, however, that if, in fact, it can be shown that the conditions on which the order was predicated were not truly the actual conditions, then a modification may be sought and obtained. We hold that such modification may be based on the facts as they existed at the time of the order which is to be modified."

tory standards. Actual compliance comes later. In the meantime, nothing precludes American or Electric from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist, thereby making some other type of order more appropriate. Section 11 (b) expressly envisages such a procedure, with provision for notice and hearing. American and Electric thus are not yet foreclosed from attacking the Commission's orders under § 11 (b) (2)."

This Court made no finding in the *American Power Co.* case that there must be a change in conditions to justify a revocation or modification of its prior order.

It is straining the language of the last sentence of Sec. 11 (b) to contend as the S. E. C. does here (brief, p. 31) that the S. E. C. order of September 13, 1955 is not such an order as is contemplated for judicial review under the subsection. It was on the suggestion of the S. E. C. that the Louisiana Commission filed a detailed offer of proof and accompanying brief; subsequently lengthy oral argument before the S. E. C. occurred. The S. E. C. treated the Louisiana Commission's petition, supplemental petition, offer of proof and brief as a request for modification of its prior order and for reopening of the proceeding. When it handed down its findings and opinion on September 13, 1955, it entitled them, "Reopening of Proceedings" and "Modification of Prior Order". (R. 129). Attached to its findings, bearing the same date, September 13, 1955, was an order described as, "Order Denying Petition to Reopen Prior Proceedings and Modify Order". (R. 133).

Surely the S. E. C. believed that it had made an order on September 13, 1955, and it was an order made only after detailed reconsideration of its findings and opinion, with a complete analysis of the offer of proof but with stout adherence to the erroneous interpretations of the Public Utility Holding Company Act, with which the Court below found it to be in error. The Court below found that the order denying the request for modification of the earlier order is expressly reviewable. (R. 138). See also these cases which support the lower court's view: *Todd v. S. E. C.*, 137 F. (2d) 475, (C. A., 6th Cir., 1943), and *Protective Committee v. S. E. C.*, 184 F. (2d) 646, (C. A., 2nd Cir., 1950).⁸

⁸ In those instances where a forum considers a motion for a new trial, an application for rehearing or a pleading for reconsideration, on its merits, such consideration extends and enlarges the period for appeal, even though the motion, application, etc. be made untimely. This holding is found in *Bowman v. Loperena, et al.*, 311 U. S. 262, 61 S. Ct. 201 (1940), where the Court said:

"Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and the hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack."

"These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." (Citing cases.) (Emphasis added.)

To the same effect: *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144, 63 S. Ct. 133 (1942); *Babler v. United States*, 137 F. (2d) 98 (C. A., 8th Cir., 1943); *Denholm & McKay Co. v. Commissioner of Internal Revenue*, 132 F. (2d) 243, (C. A., 1st Cir., 1942).

II.

The "Loss of Substantial Economies" Criterion Provided for in Sec. 11 (b) (1) (A) of the Act and Necessary to Permit a Registered Holding Company to Control One or More Additional Public Utility Systems Means, (a) Loss of Economies to the Principal System as Well as to the Additional Systems; (b) Such "Loss of Substantial Economies" is a Relative and Elastic Term and Does Not Mean That There Must Be Such Serious Economic Impairment to the Systems Involved as to Prevent Their Efficient Operation Under Separate Ownership.

In its earlier order of March 20, 1953, the S. E. C. said, "We have previously held that the loss in economies which may be considered under Clause A of Sec. 11 (b) (1), are limited to those directly related to the additional system sought to be retained and not to the principal system. . . ." (R. 118). In its later order of September 13, 1955, the S. E. C. said, "We there pointed out that under Sec. 11 (b) (1), Louisiana Power could retain its gas operations only if they were so small that they could not operate economically under separate management, and we found that it was clear that the Louisiana Power's gas properties are capable of effective and economical operation as a separate entity." (R. 132). But the language of the Act does not support the S. E. C. interpretation. The terms of the statute are not so limited. Compare Clause (A), Sec. 11 (b) (1), which reads as follows: "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system". The clause does not state that the loss of substantial economies must be to the

additional system only, but refers in general terms to the "loss of substantial economies" itself. Whether by the parent system or the additional system is immaterial for the clause refers to the "loss" which would be saved by the retention of control by the holding company of the additional systems. So if there is a loss of substantial economies either to the additional utility or to its principal company, or both, the requirements of Clause A are satisfied. The Court below so held, and in its opinion it said (R. 139, 140) :

"We think that the language of a statute should be construed, if possible, by taking the usual intendment of the words without reference to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear.

"Giving to the language of Sec. 79k (b) the meaning normally attributed to the words used, we think it quite clear that if, in fact, there is a loss of substantial economies either to the separated utility or to the parent company, then the proviso in clause A is satisfied, for in such event it is clear that 'each of such additional systems (here the gas system) cannot be operated without the loss of substantial economies (to the parent company) which can be secured by the retention of control by such holding company of such system.' Since the term 'loss of substantial economies' is not expressly restricted in the statute to the economies relating to the operation of the additional companies, but is in terms broad enough to include the loss of substantial economies to the holding company as well,

it would require judicial legislation for the court to cut it down as contended for by the Securities and Exchange Commission."

The Legislative history cited by the S. E. C. in its brief (p. 39) is not conclusive. It is important that we do not forget the language employed in the statute itself, which is the foremost guide to legislative intention. *U. S. v. American Trucking Associations*, 310 U. S. 534, 543 n. 18; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 390-5.⁹

The S. E. C. has cited in its brief (p. 43) *North American Co. v. S. E. C.*, 327 U. S. 686, at 696-697, in support of its theory and interpretation that the loss of economies relates only to the additional system and not to the principal system as well. But a careful reading of the cited language does not support its view. The quotation from the opinion is merely a paraphrase of the provisions of Section 11 (b) (1) (A) (B) (C). The opinion of the Court below in the instant case is founded on these same sub-sections, and the holding is based on the interpretation of Clause (A) that the loss of substantial economies relates both to the principal and the additional utility systems.

The S. E. C. cites the *Philadelphia Co.* case, 177 F. (2d) 720, 724 (C. A., D. C.) as supporting the proposition that the losses to be considered must relate solely to the

⁹ In *U. S. v. American Trucking Associations*, 310 U. S. 534, 543, this Court said:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

additional system. But there is no language in the opinion of the Court of Appeals for the District of Columbia Circuit on the subject and no holding supporting the S. E. C.'s view. The case is not authority, therefore, for the proposition. Nor is *Engineer's Public Service Company v. S. E. C.*, 138 F. (2d) 936 (C. A., D. C.) cited by the S. E. C. (brief, p. 42).

There is language in the majority opinion of the *Engineer's* case, *supra*, contrary to the S. E. C. position, and the Court held that the S. E. C. could not legally permit continued control of Virginia Gas by Virginia Electric, unless it could be found from the evidence that, "such continuing strength would not entail a sacrifice upon the part of the controlling utility".¹⁰

The court below reviewed the S. E. C.'s interpretation, that the losses should relate only to the additional system, and said (R. 140):

"Neither the legislative history, if we are to consider that, nor the one court decision, relied on by the respondent, discussed this precise point. We cannot permit our conclusion as to the correct construction of the Act to be overborne by discussion by another court of other features of the Act from

¹⁰ The Court of Appeals for the District of Columbia circuit said in the *Engineer's* case (138 F. (2d) 936, 944) that, "It is our belief that the Commission could not legally 'permit' the continued control of 'Virginia Gas' by 'Virginia Electric' unless it could be found from the evidence adduced at the hearing: (a) That there would be a continuing substantial strength, enjoyed by the controlled company which it would not have under its own control. (b) That there would be in the situation no reasonable expectation that a compensating strength would not be enjoyed by reason of its own control. (c) That such continuing strength would not entail a sacrifice upon the part of the controlling utility."

which a contrary construction can at most only be inferred. This is too important a part of the section to be interpreted by such method. Furthermore, while we recognize the merit of respondent's contention that the interpretation placed on a law by the agency enforcing it is persuasive, no one will contend that it is not, after all, the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy."

"LOSS OF SUBSTANTIAL ECONOMIES" IS A RELATIVE AND ELASTIC TERM.

The court below also discussed the meaning of "substantial economies" and held (R. 141, 142):

"There remains the question as to what is meant by the language 'substantial economies.' The Commission contends that economies are not substantial unless their loss 'would cause a serious economic impairment of the system' such as 'to render it incapable of independent economical operation.' It cites *Engineers Public Service Co. v. S. E. C.* (D. C. Cir.), 138 F. (2d) 936, and *Philadelphia Co. v. S. E. C.* (D. C. Cir.), 177 F. (2d) 720, as supporting this proposition. We think neither case accepts the contention of the Securities and Exchange Commission that the words 'substantial economies' must be so construed. The *Engineers Public Service Co.* case says 'substantial economies must mean, as was said in *North American Company v. S. E. C.* (2nd Cir.), 133 F. (2d) 148, 152 'important economies'." To be sure there was a dissent in

which Judge Soper, who wrote the opinion, favored a reversal of the order of the Securities and Exchange Commission because he thought the undisputed facts constituted a showing of 'substantial economies'. The majority merely felt that the evidence was not conclusive, and therefore declined to reverse the finding of the Commission. There was no specific holding by the court that the Commission's formula as to what was meant by 'substantial economies' was universally applicable. Much the same is true of the later decision in the Philadelphia Company case. There the court affirmed an order of the Securities and Exchange Commission, in which its limiting formula had been applied. The court there said "substantial" is a relative and elastic term.' In the context of the particular case, the court then said: 'We cannot find the Commission's understanding of the term "substantial economies" is wrong.'

"We are convinced that the formula proposed by the Commission is not one that is to be inflexibly used in the application of Clause A of the saving section. We think as has been said by the Court of Appeals for the Second Circuit in *North American Company v. S. E. C.* (2nd Cir.), 133 F. (2d) 148, 152, and as stated in the *Engineers Public Service Company* case, *supra*, that the term 'substantial economies' means important economies. The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without

substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses."

The *Philadelphia Co.* case, 177 F. (2d) 720 (C. A., D. C.) was decided solely on the basis of the facts presented, and the Court held that it, "could not review or reweigh the evidence beyond determining that the finding does or does not appear to be unreasonable" (page 724). At page 725, the Court of Appeals for the District of Columbia said that, "Even if the Commission had set up an erroneously high standard of proof, no prejudice would have resulted, for the Commission did not think petitioner's case proved by any standard, however low."

This Court will look in vain in the *Engineer's* case, 138 F. (2d) 936 (C. A., D. C.) for language to support the S. E. C. view that the losses described in the subsection must cause a serious economic impairment of the system, such as to render it incapable of independent economical operation. There is no conflict between the District of Columbia Circuit and the Fifth Circuit on this question of law, as we have pointed out. Taken at its best, the language in the *Philadelphia* case, *supra*, is *dictum*, because the Court there pointed out (page 725, footnote 23) that the S. E. C. did not think that petitioner's case had been proved or that the evidence and facts supported petitioner's claims, but fell far short of establishing that substantial economies would be lost on segregation. It found that the principal witness' studies were entitled to little or no weight. Thus the case was decided on its particular facts, which vary from the facts in the present case.

The S. E. C. orders in the present case are based therefore, on erroneous legal interpretations. In its earlier order of March 20, 1953, the S. E. C. held, "For the loss of economies to be 'substantial' they must be 'important' in the sense that they are of such magnitude as to cause a serious economic impairment of the system." (R. 117). In its September 13, 1955 order in this case, the S. E. C. said, (R. 132), "We there pointed out that under Section 11 (b) (1) Louisiana Power could retain its gas operations only if they were so small that they could not operate economically under separate management, and we found that it was clear that the Louisiana Power's gas properties are capable of effective and economical operation as a separate entity."

The test which the S. E. C. has imposed in this case for Section 11 (b) (1) (A) compliance, that the "loss of substantial economies" must be such a loss that would cause such serious economic impairment to the systems involved as to prevent their efficient operation under separate ownership, must fall; it has no support in the statute itself. A more reasonable construction is that which is placed on the Act by the court below, i. e., that the term "substantial" is a relative and elastic term; that it means important economies, and the question of importance must be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses.

CONCLUSION.

The points of law involved here have not heretofore been directly passed on by this Court. The opinion of the

Court below considered all the issues which are now before this Court for ultimate determination. It is on belief that the lower Court's views are supported by logic and reason, as well as by those legal authorities which are available. The principal objectives of the Public Utility Holding Company Act of 1935 already have largely been accomplished. Here a State Commission, responsible to its citizens who are consumers and rate-payers, seeks to prevent an undesirable result which it feels is wholly unnecessary under the circumstances. The Louisiana Commission is attempting to prevent a loss of nearly a million dollars annually to the rate-payers of Louisiana Power. The separation of the electric and gas utility systems has not yet occurred. The S. E. C. order to do so is based on erroneous legal interpretations. This Court can correct the errors which have been committed, and can stop the execution of the "death sentence" before it is carried out. We urge it to do so by giving full effect to the provisions of the Act and by remanding this cause to the S. E. C. for further hearing.

The opinion of the court below is correct. It should be affirmed and this cause remanded to the S. E. C. for further proceedings, consistent with the opinion.

Respectfully submitted,

ROBERT A. AINSWORTH, JR.,

Counsel for Respondent,

Louisiana Public Service Commission.

Of Counsel:

AINSWORTH & AINSWORTH,

1650 National Bank of Commerce Building,
New Orleans, Louisiana.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

**LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC.,
AND LOUISIANA POWER & LIGHT COMPANY,**
Respondents.

*On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit.*

**BRIEF OF LOUISIANA POWER & LIGHT COMPANY,
RESPONDENT.**

**J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
MALCOLM L. MONROE,
ANDREW P. CARTER,**

*Counsel for Respondent,
Louisiana Power & Light
Company.*

Of Counsel:

**MONROE & LEMANN,
1424 Whitney Building,
New Orleans, Louisiana.**

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 134) is officially reported at 235 F. (2d) 167. The Securities and Exchange Commission findings and opinions are unreported; those of September 13, 1955 are found at R. 129, and of March 20, 1953 at R. 103.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. 1254(1); writ of certiorari having been granted on

December 3, 1956 (R. 144) to the U. S. Court of Appeals (5th Circuit) decision of June 30, 1956 (R. 134).

QUESTIONS PRESENTED

I.

SUBSTANTIVE QUESTIONS

Whether the requirement of Section 11(b) (1) (A) of the Public Utility Holding Company Act of 1935 (the Act) that the retention of an additional integrated public utility system **shall** be permitted if

"each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system"

means that

(a) the only "loss of economies" to be considered are those affecting the system to be disposed of, without regard to the economic effect on the remaining system; and

(b) the words "loss of substantial economies" must be construed to mean that losses to the system to be disposed of are so fatal that such system is "incapable of independent economic operation."

II.

PROCEDURAL QUESTIONS

Whether the special provision of Section 11(b) (1) (applicable to no other sections or subsections of the Act), namely,

"The Commission may by order revoke or modify any order previously made under this sub-

section, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in Section 24"

(a) grants no greater right of review and appeal than Section 24(a) of the Act, which applies to the Act as a whole; and (b) whether the phrase in the section above quoted, "the conditions upon which the order was predicated do not exist", should be interpolated to read "the conditions upon which the order was predicated do not, and did not at the time of the previously issued order exist, and that no review of erroneous legal conclusions which might be, or might have been, essential conditions of such order can be entertained.

The Securities and Exchange Commission (SEC) contends that both substantive questions I(a) and I(b) are to be answered in the affirmative. Respondent believes both should be answered in the negative. However, if either of the substantive questions are to be answered in the negative, the judgment of the Court below should be affirmed and the matter remanded to the SEC for further proceeding. Respondent Louisiana Power & Light Company (Louisiana) suggests that the substantive questions are of such great importance that they should be passed on by this Court. Louisiana believes both procedural questions should be answered in the negative. However, it will in this brief comment only briefly on the procedural questions.

STATUTE INVOLVED

The Public Utility Holding Company Act of 1935, and Sections 1, 8, 11(b), and 24(a) thereof (15 U.S.C.

79a, 79(k) (b), 79(h) and 79x(a)). Sections 1 and 8 are set forth in the appendix hereto.

STATEMENT

In the hearing before the SEC of February 1953, and again in the hearing of July 1955, Louisiana continuously and consistently took the position that (a) its gas system cannot be operated as an independent system without the loss of substantial economies which can be secured by retention of such system by Louisiana, (b) that the interest of gas and electric customers of Louisiana, as well as the public interest, would best be served by the continued operation of both systems by Louisiana, and (c) that the continued operation of both the gas and electric systems under the control of Louisiana (a subsidiary of Middle South Utilities, Inc.) does not result in an operation so large (considering the state of the art and the area or region affected), as to impair the advantages of localized management, efficient operation, or effectiveness of regulation, and further, that Louisiana's gas distribution system in and around the City of New Orleans is integrated with the gas distribution system of New Orleans Public Service, Inc., a sister company serving the City of New Orleans, and should be retained for this additional reason.

On January 29, 1953, the SEC issued a notice of the convening of a hearing to be held on February 19, 1953, pursuant to Section 11(b) (1) of the Act, to decide, among other things, whether Louisiana should be required to take action to dispose of the gas utility assets and non-electric assets of Louisiana (R. 80). In accordance with this notice, a hearing was held on February 19 and 20, 1953, approximately three weeks after the date of the notice. At this hearing, Louisiana introduced

evidence in support of its position above stated, in the form of Exhibits and oral testimony of its President. This evidence showed that, based upon its operations in the year 1952, as a result of the proposed separation of the gas properties from its system, Louisiana's remaining electric properties would have had, during 1952, a loss of economies amounting to approximately \$400,000-\$450,000 (R. 117). This was based on a personnel study. Mr. Turner also testified that he estimated that there would be a loss of economies in the gas properties on the order of \$250,000, based on his experience in operating these properties of Louisiana from its organization in 1927. This estimate as to the loss of economies in the gas properties was not based on a separation study, as Louisiana had not been able to make such a study between the date of the notice, January 29, 1953, and the date of hearing, February 19, 1953, and inasmuch as the Louisiana Public Service Commission (the Louisiana Commission) later took approximately four months to make such a study, it would appear doubtful that such a study could have been made within that period. In its findings and opinion of March 20, 1953, in which the SEC held that Louisiana should dispose of its gas properties, it specifically commented:

"No study of any kind was introduced to show what the expense of the gas properties would be if they were to be operated as a separate unit."

The evidence introduced by Louisiana as to the loss of economies to the electric and gas properties was uncontradicted in the record at the hearing on February 19 and 20, 1953 and the staff of the SEC introduced no contrary evidence, nor any evidence of compensating advantages to be gained by the separation of the gas properties.

On March 20, 1953, SEC issued its divestment order (R. 127).

After Louisiana, on November 10, 1954, filed with SEC a joint Application-Declaration with Louisiana Gas Service Corporation, proposing a plan for disposition of its non-electric properties pursuant to such order, and filed the said plan with the Louisiana Commission, the Louisiana Commission, by telegram and petition, asked the SEC for a hearing, and asked that the proceedings on which the March 20, 1953 order was predicated be reopened. The SEC then requested the Louisiana Commission to file an Offer of Proof, and set a date for oral argument. Thereupon, the Louisiana Commission sent members of its staff to Louisiana's offices and proceeded over a period of four months to make a comprehensive separation study, which was subsequently filed with the SEC in its Offer of Proof. Exhibit B of this Offer of Proof (R. 17), with its supporting exhibits, indicates that, based on operations for the year 1954, separate operation of the gas properties would have resulted in an annual loss to non-electric consumers of \$272,816, and an annual loss to electric customers of \$684,377, or a total annual loss to Louisiana's customers of \$957,193.

Lengthy oral argument was held in July 1955 resulting in the SEC order of September 13, 1955 (R. 129).

Louisiana stated before the SEC in the July 1955 hearing, and reiterated the same in its brief and statement on oral argument before the U. S. Circuit Court of Appeals for the Fifth Circuit, and here again reiterates, that it has examined the Offer of Proof and Exhibits attached thereto (R. 1 through 49) and believes that the facts which the Louisiana Commission there

sought to prove are substantially correct in all respects. An examination of the separation study made by the Louisiana Commission has been conducted and it was found to corroborate the testimony offered by Louisiana in the earlier SEC proceedings and demonstrates that a separation of the gas and electric properties cannot be effected without the loss of these substantial economies.

The Louisiana Commission appealed from the order of the SEC dated September 13, 1955, to the United States Circuit Court of Appeals for the Fifth Circuit which, after hearing oral argument, on June 30, 1956, handed down its opinion (R. 134) remanding the matter to the SEC for further consideration in the light of the opinion.

It is a geographical fact that the electric properties and the gas properties of Louisiana are both wholly within the State of Louisiana, and, in fact, the gas properties, with minor exceptions, serve the same territory as a portion of the electric system, and, in most instances, its gas customers are also its electric customers. All of Louisiana's rates, both gas and electric, are subject to regulation by the Louisiana Commission, except its rates for sale of electric energy to other utilities in interstate commerce, which are regulated by the Federal Power Commission, and except for its electric rates in Algiers, which is the 15th Ward of the City of New Orleans, which rates are regulated by the Commission Council of the City of New Orleans. None of its rates are regulated by the SEC. It is plain that the requirements of Section 11(b) (1) (B) are met, and no serious contention has been made that the conditions of Section 11(b) (1) (C) have not been met.

Serving electric customers in territory in Louisiana

adjacent to Louisiana's territory are utilities which also distribute gas to their customers.

When the Public Utility Holding Company Act was passed in 1935, Louisiana was part of the Electric Bond and Share holding company system. That system consisted of Electric Bond and Share Company as the top holding company, having as its principal immediate subsidiaries five subholding companies, each of which in turn owned large numbers of utility operating companies operating in many widely scattered States. In total, there were more than 237 companies in this system, operating in 32 States and thirteen foreign countries.¹ The utility and non-utility fields in which these companies operated included electric generation, transmission and distribution, gas production, transportation and distribution, water production and distribution, telephone operation, public transportation, production and distribution of steam, production and sale of oil, sulphur, and other minerals, and a number of other businesses. Louisiana was a wholly owned subsidiary of Electric Power & Light Corporation, one of the five subholding companies of Electric Bond and Share. At that time, Louisiana was operating electric, gas, telephone, transportation, and water properties. Electric Power & Light owned 9 additional companies, operating in 11 additional States and in Mexico. At the time of the passage of the Holding Company Act, there were many other similar holding company systems operating in the utility field, and it was in light of this then existing situation that the Holding Company Act was considered and passed by Congress.

Since that time, Electric Bond and Share Co. has dis-

¹ See *Electric Bond & Share Company v. Securities and Exchange Commission*, 303 U.S. 419; *American Power & Light Company v. Securities and Exchange Commission*, 329 U.S. 90.

posed of control of all of its utility interests, except American and Foreign Power, which operates only outside of the United States, and Electric Bond and Share Co., no longer has any interest in Louisiana or in Middle South Utilities, Inc. Electric Power & Light Corporation, Louisiana's former parent, has been dissolved and its properties disposed of. Louisiana Power & Light Company, Arkansas Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc., four integrated utilities serving contiguous territory, have, with the approval of the SEC, been acquired by Middle South Utilities, Inc. (R. 103-128) Louisiana has disposed of its telephone properties, its transportation properties, its water properties, with the exception of a small property at Arcadia, Louisiana, and those electric properties which were physically separated from its integrated system. So that, today, Louisiana's operations are limited to its integrated electric system and its gas distribution properties, and one small water property. Its accounts have been duly "reclassified", its corporate structure simplified and it has met all other standards of the Act.

ARGUMENT

Counsel for Louisiana have reviewed the brief of the Louisiana Commission, and agree with and adopt the arguments therein made. In the interest of brevity and to save repetition, we will not here repeat these arguments although we believe that they are conclusive on the matter.

I.

SUBSTANTIVE QUESTIONS

SECTION 11(b)(1)(A) OF THE PUBLIC UTILITY HOLDING COMPANY ACT DOES NOT REQUIRE THE CONSTRUCTION (A) THAT THE ONLY

"LOSS OF ECONOMIES" TO BE CONSIDERED ARE THOSE AFFECTING THE SYSTEM TO BE DISPOSED OF, WITHOUT REGARD TO THE ECONOMIC EFFECT ON THE REMAINING SYSTEM, NOR (B) THAT THE WORDS "LOSS OF SUBSTANTIAL ECONOMIES" MUST BE CONSTRUED TO MEAN THAT LOSSES TO THE SYSTEM TO BE DISPOSED OF ARE SO FATAL THAT SUCH SYSTEM IS INCAPABLE OF INDEPENDENT ECONOMIC OPERATION

FOR THE FOLLOWING REASONS:

(A) THE ORDINARY MEANING OF THE WORDS OF THE STATUTE WOULD NOT LEAD TO SUCH CONSTRUCTIONS.

(B) SUCH CONSTRUCTIONS WOULD BE CONTRARY TO THE EXPRESSED INTENT OF CONGRESS AS SET OUT IN THE ACT.

(C) THE LEGISLATIVE HISTORY OF THE ACT DOES NOT COMPEL CONSTRUCTIONS AT VARIANCE WITH THE ORDINARY MEANING OF THE WORDS OF THE STATUTE.

(A)

The ordinary meaning of the words of the statute would not lead to such constructions

(1) The first substantive question is, what economies should be considered—only those lost by the system to be separated (as contended by SEC)—or all those involved in the transaction, as contended by the Louisiana Commission and Louisiana.

We suggest that if Congress intended that the only

economies with which it was concerned were those lost to the system to be separated, it would have put a period after the word "economies" and eliminated the remaining wording, so that Section 11(b) (1) (A) would read:

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies"

However, Congress added the words:

"which can be secured by the retention of control by such holding company of such system."

It would appear Congress was concerned ~~in~~ so much with the loss of economies, as with the economies which could be secured by retention of control by the holding company system. Clearly, the economies which would be secured by retention would include economies in all of the retained properties. It is difficult to see how this plain language could be otherwise construed, particularly in view of Congress' expressed intent as discussed below. Here the facts offered for proof, which must be accepted as true for the purposes hereof, show that economies of \$957,193 would be secured by the retention of the gas properties, which would otherwise be lost by separation of the gas properties. In order to reach its conclusion, contrary to the plain wording of the statute, the SEC must in effect add the words "to the independent system" to the language, so that the subsection would read as follows:

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies *to the independent system* which can be secured by the retention of control by such holding company of such system."

(2) The second substantive question is, whether loss of **substantial economies**, as used in the statute, would mean such a loss as would make an additional system incapable of independent operation. As shown above, the wording of the section indicates that the guiding standard is "substantial economies which can be secured by retention." The substantialness of the **economies**, not the substantialness of the **loss**, is what is in question. It follows that we are not concerned with the degree of disaster of the loss, but with the importance or substantialness of the economies which might be secured.

SEC argues that the phrase "substantial economies" cannot be clearly construed without reference to the legislative history of the Act to determine intent. While we will discuss legislative history later, it is submitted that the words "substantial economies" are no harder to construe than such oft construed phrases as "reasonable", "hazardous", "not so large considering the nature of the art", and innumerable others. While the meaning of the word "substantial" must be determined in accordance with the context in which it is used, generally speaking, it is understood to mean "important" as opposed to "inconsequential", "large" as opposed to "small".²

To engraft on the words of the statute the condition that loss of economies, to be substantial, must be so dis-

² See Corpus Juris Secundum, Volume 83, page 762:

"The term has reference to something worthwhile as distinguished from something without value or merely nominal, and it imports a considerable amount of value in opposition to that which is inconsequential or small, and in this sense is defined as meaning of real worth and importance; of considerable value; valuable; considerable in amount, value, or the like. In opposition to that which is inconsequential or small, the term is also defined as meaning-large."

The relative substantialness or importance of the economies here shown should be considered in the light of the action taken by the Louisiana Commission herein, since it is the Commission primarily concerned therewith.

astrous as to make the disposed of Company "incapable of independent economic operation"—words which Congress did not insert—as SEC seeks to do—is to import into the Act an entirely new and different standard of which the actual words of the statute give not the slightest intimation. Such a construction would be nothing less than an amendment of the Act.

It also seems clear that if Congress intended that "incapacity of the independent system to operate separately" was to be the standard to be applied, it could very easily have said just that. Congress did not say that. And the standard set up by the plain words of the statute should be applied—not that which an administrative agency decides the statute should have said.

(B)

Such construction would be contrary to the express intent of Congress as set out in the Act.

(i) The yardstick which Congress has clearly marked for guidance in the construction of the Public Utility Holding Company Act is the phrase "in the public interest or for the protection of investors or consumers". This phrase, or a paraphrase thereof, appears at least 70 times in the Act. It appears in Sections 1(b), 1(c), 2(3), 2(4), 2(7) (twice), 2(8) (twice), 3(a), 3(b), 3(d), 5(a), 5(b), 5(b)(1), 5(b)(2), 5(b)(3), 5(c), 6(b), 7(a), 7(a)(1), 7(a)(2), 7(c)(2), 7(c)(3), 7(d)(6), 7(e), 9(c)(2), 9(c)(3), 10(a), 10(a)(1), 10(a)(2), 10(a)(3), 10(b)(1), 10(b)(3), 10(b), 10(c)(2), 10(e), 11(b)(1), 11(c), 11(d), 11(e), 11(f) (twice), 11(g)(1), 11(g)(3), 12(b), 12(d), 12(e), 12(f), 12(i) (twice), 13(a), 13(b) (twice), 13(c), 13(d), 13(f), 14 (twice), 15(a), 15(b), 15(c), 15(d), 15(g), 15(h), 17(b), 17(c), 19, 20(b), 20(d), 22(a), 30.

The remarkable repetition of the phrases "public interest", "interest of investors" and "interest of consumers" clearly demonstrates that Congress intended these interests as a guide to interpreting the act.

Applying these measuring sticks to the facts in this case we find:

(a) As to **consumers** we find that the uncontroverted evidence in the record is to the effect that the interpretations urged by the S.E.C. are extremely detrimental to the consumers here involved, whereas the normal meanings of the words of the statute as urged by the Louisiana Commission would be greatly to the interest of the consumers involved. In this connection it is well to note that the S.E.C. has no direct contact with the consumers involved and no responsibility with respect to rates, whereas the Louisiana Commission is elected by such rate payers and has direct jurisdiction of such rates.

(b) As to the **public interest** the Governor of the State of Louisiana, the elected mayors and councilmen of 28 of the thirty towns scattered over Louisiana and the police jurors of fourteen of fifteen parishes in which Louisiana renders gas service have all, in addition to the elected public service commission, voiced their opinion that the public interest would be best served by retention of the gas properties by Louisiana (R. 45-49). The one parish (Jefferson) and the two municipalities located therein which at first favored severance on the basis of a proprietary interest in operating the gas properties within the parish as public operators have since withdrawn their opposition to the position of the Louisiana Commission.

On the contrary, there appears not one scintilla of evidence in the record that the public interest would be

in any way benefitted by the divestiture of the gas properties as urged by SEC. It would, therefore, appear that the public interest would be best served by the construction which we submit is in accordance with the usual meaning of the words of the Statute.

(c) As to the interest of investors the record is devoid of evidence as to how they might be affected one way or another. However, it is to be noted that prospective investors in first mortgage bonds of the gas properties as a separate system would require a higher interest rate than those investing in first mortgage bonds of the combined properties (R. 7-8) and it could be generally assumed that the position taken by Louisiana is in accord with the best interest of its stockholders.

(ii) Congress has expressly set out in Section 1 of the Act (See Appendix) the objectives which the Act sought to achieve and the evils which it sought to cure. In Section 1(b) are enumerated the conditions that do or may affect adversely the interest of the public, consumers or investors. A careful consideration of subsections 1(b) (1-5) in the light of the record in this case will clearly demonstrate that there exist here no enumerated evils which the ordered segregation of Louisiana's gas properties would cure, the elimination of which is the declared purpose of the Act.

For emphasis we quote from Section 1(c)

" * * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; * * *"

It is clear that no enumerated evil would be eliminated by the SEC order, nor would such order provide for elimination of properties "detrimental to the proper functioning of such system".

(iii) It is generally accepted that an act should be interpreted as a whole, and all its sections construed so as to show a consistent purpose.

In that connection, attention is called to Section 8 of the act (See Appendix). This section in effect provides that the standard for decision as to whether a holding company or subsidiary thereof should be allowed to acquire gas properties serving the same territory as the electric property, is whether the state law prohibits it (which here it does not) and whether the State Commission expressly approves. It is submitted that this standard set up by the act for acquisition of gas properties is at sharp variance with the SEC's harsh interpretation of the conditions which must be met for retention of a gas property, particularly when the State Commission here is strongly urging retention.

(iv) Further, under Section 3 of the Act, the SEC has itself held that it is not necessary for an electric holding company to dispose of its gas properties before being granted exemption from the Act; although such company has been required to meet the other provisions of the act.³

(v) We further refer the court's attention to Section 21 of the Act and particularly the latter part reading as follows:

" * * * nor shall anything in this title affect the jurisdiction of any other commission, board,

³ *Re Northern States Power Company*, 6 P.U.R. (3d) 48 (September 16, 1954).

agency, or officer of the United States or of any State or political subdivision of any State, over any person,⁴ security, or contract, insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation, or order thereunder."

It is submitted that this is a matter in which the Louisiana Commission plainly has always had jurisdiction. In view of the above provision, this jurisdiction should not be disturbed unless it has been expressly superseded by a clear express provision of the Act, not by a strained expansive interpretation of the words of the Act.

(C)

The legislative history of the Act does not compel constructions at variance with the ordinary meaning of the words of the statute.

(1) As originally passed by the Senate, Section 11 (b) (1) of Senate Bill 2796 made no exception to the death sentence provisions for retention of either additional integrated system for other businesses.⁵ After considerable debate in the House, the section was amended and the amendments were explained in the report of the Committee of the whole House dated June 24, 1935, as follows:

"Sub-section (b), relating to the simplification of holding company systems and elimination of holding companies, is modified so that the only remaining provision providing for simplification or elimination makes it the duty of the commission to require each holding company system to confine its operations to one integrated public utility system, with the exception that if the commission finds that such a limitation is not necessary in the public interest, it is to require the limitation of the

⁴ Defined to include "corporations".

⁵ See Senate Report 621, 74th Cong., 1st Sess., pp. 11, 32.

operations of the holding company system to such number of integrated public utility systems as it finds may be included in the holding company system consistently with the public interest. The commission is authorized to require divestment of non-utility property only where it finds the retention thereof would be inconsistent with the public interest, and the commission is further limited in that it may not require divestment of interests outside of the United States." (H. Rep. 1318, 74th Cong., 1st Sess., p. 17)

Thus, very broad exceptions to the death sentence provisions were added by the House. The House version was passed July 2, 1935 (74th Cong., 1st Sess., Cong. Rec. p. 10640). On July 9, 1935, the Senate disagreed with the House amendments and asked for a conference. On July 12, 1935, the House insisted on its amendments and agreed to a conference with the Senate. (74th Cong., 1st Sess., Cong. Rec., p. 11095).

On August 1, 1935, Mr. Rayburn made a motion in the House to instruct the House conferees to agree to the provisions of Section 11 as set out in the original Senate Bill. This motion was defeated in the House. On August 23, 1935, the conference report was submitted by Mr. Rayburn, in which it is stated:

"Under the House amendment (Section 11(b)) the commission is required to direct each holding company system to reduce its operations to one integrated public utility system (a defined term meaning substantially the same as geographically and economically integrated public utility systems, the term used in the Senate bill) with the exception, however, that if the commission finds that it is not necessary in the public interest to limit the operations of the system to one integrated public utility system, it is to require such action as is necessary to limit the operations of the

system to such number of integrated public utility systems as it finds may be included in the holding company system consistently with the public interest * * *

"The substitute agreed to, with respect to the question of integrated public utility systems provides that the commission shall as soon as practicable after January 1, 1938, require each holding company system to be limited to a single integrated public utility system and such other integrated public businesses as are incidental or economically appropriate to such integrated system, but includes an exception.

"This exception provides that the commission shall permit additional integrated systems if it finds that

(1) each such additional system cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control of the holding company;

(2) all such additional systems are located in a restricted area;

(3) the continued combination of such systems under the control of one holding company is not so large as to impair the advantages of localized management, efficient operation or the effectiveness of regulation. * * *

It may be observed that Section 11(b) in both the Senate bill and the House amendment contemplates the reestablishment of the advantages of localized management in the operating utility industry and the consequent breakdown of the controlled companies over geographically scattered operating utility companies. Section 11 of both bills, therefore, authorizes the Securities and Exchange Commission to require a holding company to limit its control over operating utility companies to one integrated public utility system.

"To this limitation the Senate bill like the House bill allows in Section 3 exceptions in the case of a holding company whose interests are essentially intrastate and in the case of a holding company whose interests are essentially foreign. The House amendment grants what amounts to a further exception when the commission finds that more than one integrated system may be included in a holding company system 'consistently with the public interest.'

"The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. Definite exceptions not only provide a satisfactory constitutional standard but also an effective standard for the guidance of both the Securities and Exchange Commission and those holding companies which wish voluntarily to comply with congressional policy." (H. Rep. 1903, 74th Cong., 1st Sess., p. 69-70).

Section 11(b) of the Act was debated hotly and at great length. The Senate bill proposed by Senator Wheeler would allow no exception to the limitation of holding companies to one integrated public utility system. The House, however, insisted that exceptions be made for both additional integrated utility systems as well as other businesses. The House insisted on its amendment by votes on two occasions. The resulting compromise reported by the Conference Committee retained exceptions insisted on by the House for both additional integrated utility systems and other businesses, within more accurately defined limits. It seems clear that the bill, or at least Section 11(b), could not have passed Congress without these exceptions, which were necessary to get an agreement by the House. It would be natural for proponents of the original Senate bill to seek by argument or inter-

pretation in debate to narrow the scope of these exceptions. However, the interpretations given to the exceptions, contained in 11(b)(1)(A)(B)(C), by the SEC, would, for all practical purposes, eliminate the exception entirely. We submit that, based on the legislative history, the House would not have agreed to a provision expressly circumscribing this exception to the extent contended for by the SEC.

(2) Senate Bill 2796, as amended, which became the Public Utility Holding Company Act of 1935, was in part the result of recommendations contained in the report of the National Power Policy Committee on public utility holding companies. On page 59 of its report (Appendix to Senate report 621, p. 59) this Committee states in part:

"Unless approval of a State Commission be obtained, the Commission should not permit the use of the holding company form to combine a gas and electric utility serving the same territory where local law prohibits the combination in a single company."

This would certainly indicate that it was the Committee's recommendation that such combination of gas and electric properties would not be prohibited either (a) where local law permits such combinations, or (b) the approval of the State Commission has been obtained.*

* See, also, Senate Report 621, 74th Cong., 1st Session, page 29-30, where, in discussing the provisions of Section 8 of the Act, it is stated:

"These provisions are so designed as not to interfere with State policy which allows or fosters the carrying on of waterworks, traction business, bus systems, etc., by electric and gas utilities so long as that policy will not deter the carrying out of the provisions of Section 11. * * * This subsection is concerned with competition in the field of distribution of gas and electric energy: a field which is essentially a question of State policy, but becomes the proper subject of Federal action where the extra-State device of a holding company is used to circumvent State policy."

Even statements by proponents of the Senate version indicate that the extent of the objective of the Act was to reduce the systems to such a size that they were susceptible of local regulation.⁷

It is submitted that in light of the above considerations, the legislative history of the Act does not compel a construction at variance with the ordinary meaning of the words of the Act, and it is submitted that the words of the Act are plain and do not support either construction sought to be placed on them by the SEC.

II.

PROCEDURAL QUESTIONS

(A) IN SPECIALLY PROVIDING IN SECTION 11(b) FOR REVIEW, REVOCATION OR MODIFICATION OF ORDERS UNDER SECTION 11(b) AND PROVIDING FOR APPEAL THEREFROM, CONGRESS WAS CLEARLY EXPRESSING ITS INTENTION THAT ORDERS UNDER SECTION 11(b) SHOULD BE REVIEWABLE AT ANY TIME WHERE THE CONDITIONS ON WHICH THEY WERE BASED DO NOT EXIST.

(B) THERE IS NO BASIS FOR JUSTIFYING THE INTERPOLATION OF WORDS IN THE

⁷ "Mr. Sisson: * * * But what we are hoping is that when we get the holding companies in a position where they can be properly regulated, as they can be by only Sections 11 and 13 of the Senate Bill in this legislation, that we may then look to the States for proper regulation of the operating companies." (74th Cong., 1st Sess., Cong. Rec. 10540)

"Mr. Wheeler: The section further provided that if they desired to continue to be holding companies, they might do so; that they could control other companies provided they controlled them in integrated sections where the people themselves could reach them and where there could be effective regulation." (74th Cong., 1st Sess., Cong. Rec. 10839)

PHRASE "CONDITIONS DO NOT EXIST" SO AS TO IMPORT A REQUIREMENT OF "CHANGED CONDITIONS".

With respect to these procedural issues, we submit likewise that the wording of the statute is plain, that interpretation of the language of the statute in accordance with the ordinary meaning of the words is not contrary to the intent of Congress as expressed in the Act, and that such interpretation is consistent with the legislative history of the Act. The plain language of the statute makes **any** order relative to revocation or modification (whether granting or denying such revocation or modification) expressly appealable.⁸ Its reference to Section 24 is merely to govern the procedure on appeal. We adopt without repeating the arguments made on these questions by the Louisiana Commission and add simply the following comment:

The SEC argues for its interpretations on these points the need for a final and definitive settlement of issues. Equal weight should be given, in approaching interpretations of the law, to the interest in making the Act adjustable to the present day facts of the situation. The regulatory process with which the SEC is charged is a continuing one, just as is the rate-making process. The SEC's approach would be so restrictive that it would not permit itself to correct its own acknowledged errors. It is submitted that Section 11(b), known as the death sentence section, is the most drastic provision in the entire Public Utility Holding Company Act. This would

⁸ "Mr. Borah: In other words, all these orders which would be made with reference to reorganization and so forth would be appealable to the Court."

"Mr. Wheeler: Absolutely." (74th Cong., 1st Sess., Cong. Rec. 8946.)

appear to be good reason for granting the additional review of orders issued by the commission under this section, as specifically set out in the section. The disposal of the gas properties by Louisiana has not yet taken place, so that no harm would be done by a revocation or modification of the order. We submit that the SEC should be able to commute the death sentence up to the time of execution.

In its brief, the SEC laid stress on the fact that the Act calls for compliance with Section 11(b) "as soon as practicable after January 1, 1938." We submit that this is a relative term. It was not until more than fifteen years after January 1, 1938, that the SEC entered the disposition order here involved. We are not suggesting that this length of time would not be as soon as practicable. It had to be preceded by many complex unravelings of investors' interests and corporate set-ups. We do say that in view of the time that has elapsed in reaching this point in the enforcement of the Holding Company Act, and in view of the very serious results in the carrying out of the order, that a further review of the order at this time would not be violative of the "as soon as practicable" mandate of the statute.

CONCLUSION

It is respectfully submitted that the decision of the Court below interprets the language of the Act in accordance with the plain and ordinary meaning of the words of such Act, that such interpretation is consistent with the intent of Congress as expressed in the Act, and that such interpretation is consistent with the legislative history of the Act. It is therefore respectfully submitted

that the decision of the Court below should be affirmed.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
MALCOLM L. MONROE,
ANDREW P. CARTER,

*Counsel for Respondent,
Louisiana Power & Light
Company.*

Of Counsel:

MONROE & LEMANN,
1424 Whitney Building,
New Orleans, Louisiana.

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APPENDIX

Section 1 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79(a), 49 Stat. 838) :

"Section 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and

the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issues, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affect the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or

when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

Section 8 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79(h), 49 Stat. 817) :

"Section 8. Whenever a State law prohibits, or requires approval or authorization of, the ownership or operation by a single company of the utility

assets of an electric utility company and a gas utility company serving substantially the same territory, it shall be unlawful for a registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise,—

(1) to take any step, without the express approval of the State commission of such State, which results in its having a direct or indirect interest in an electric utility company and a gas utility company serving substantially the same territory; or

(2) if it already has any such interest, to acquire, without the express approval of the State commission, any direct or indirect interest in an electric utility company or gas utility company serving substantially the same territory as that served by such companies in which it already has an interest."

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JUN 3 1957

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC., and
LOUISIANA POWER & LIGHT COMPANY,
Respondents.

*On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit.*

**PETITION FOR REHEARING OF
LOUISIANA PUBLIC SERVICE COMMISSION.**

ROBERT A. AINSWORTH, JR.,
*Counsel for Petitioner,
Louisiana Public Service
Commission.*

Of Counsel:
AINSWORTH & AINSWORTH,
1650 National Bank of Commerce Building,
New Orleans, Louisiana.

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**PETITION FOR REHEARING OF
LOUISIANA PUBLIC SERVICE COMMISSION.**

Now comes Louisiana Public Service Commission and petitions for a rehearing of the decision of this Court (*Per Curiam*) rendered on May 13, 1957, and for grounds thereof, respectfully avers:

I.

In the Court's *per curiam* opinion it is stated (p. 3) that "the offer of proof" submitted by the Louisiana Public Service Commission did not "indicate any change in conditions" since the divestment order of March 20,

1953. We suggest that a full consideration of the said offer of proof will show the following "changes of conditions":

(1) Since the 20-day notice hearing of February 19-20, 1953, the Louisiana Public Service Commission has had the opportunity to consider the effects of disposition as respects the public interest, and the interest of consumers, and has made a formal finding (Tr. pp. 42-43) that such disposition would be "contrary to the public interest", particularly the interests of the gas and electric customers of Louisiana Power & Light Company. Such formal determination, which was not before the SEC at the time of its order of March 20, 1953, is clearly a **changed condition**.

(2) At the invitation of the SEC, the Louisiana Commission has had its staff make a detailed study of the actual results of separation. This study, which is part of the offer of proof and uncontested, shows a very large annual loss of economies (\$957,000 per annum) which would result from the separation. This annual loss is a great deal larger than that estimated by Louisiana Power in its testimony before the SEC in the February 19-20, 1953, twenty day notice hearing. The standard to be applied here, "loss of **substantial** economies" is clearly a quantitative standard, and a showing of much larger loss of economies in 1955 certainly has a bearing on their substantialness and surely **represents a changed condition**. Whether or not there is a sufficient change is a question which goes to the heart of the matter, but that this is a relevant "change in conditions" cannot be doubted.

(3) The Commission also offered to prove that ex-

perience had since the original order, which experience was not available at the time of the March 20, 1953 order, had clarified the question of where the public interest in this matter lay—

(a) It offered to show the adverse experience of Arkansas and Mississippi Power & Light Companies which had disposed of their gas properties (Tr. p. 39).

(b) It offered to show the complementary nature of the gas and electric properties, which has been very greatly enhanced since the 1953 order due to the development of the air conditioning load in recent years. (Tr. pp. 37, 38).

(c) It offered to show a recent comparison of Louisiana Power's cost of gas operations with those of the most nearly comparable companies operating only gas properties, which comparison clearly demonstrated the advantage of combined operation.

All of the above represent considerations not before the Commission when it entered its order of 1953, based on developing conditions in the industry.

(4) The Commission also pointed out that the SEC order of March 20, 1953, was based on **two** misinterpretations of the standards for retention prescribed by the Act. These misinterpretations are cumulative in effect. In other words, the order of March 20, 1953 was based on two false assumptions. We submit that the establishment that the order was based on two false assumptions—or even one—constitutes a showing that conditions on which the order was based do not exist.

II.

The undisputed record in this case is that the carrying out of the SEC disposition order will result in great prejudice to the public interest and to the interest of consumers. The lower court merely remanded the case for further opportunity to present countervailing evidence, if any.

This Court in its *per curiam* simply held that the last sentence of Section 11(b), providing that **any order** under Section 11(b) is appealable, did not apply to an order reaffirming a prior order, where the SEC had fully and completely reconsidered the prior order, in the light of important new evidence produced by a responsible State regulatory body after lengthy argument.

This construction given by the Court of the wording of the last paragraph of Section 11(b) is certainly not the only reasonable construction of this language. Yet this Court has made its construction without giving its reasons for so holding.

The last paragraph of Section 11(b) reads as follows:

"The Commission may by order revoke or modify any order previously made under this sub-section, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this sub-section shall be subject to judicial review as provided in section 79X of this title."

This Court has held in its *per curiam* opinion that the last sentence of the paragraph quoted above only applied to orders which may "revoke or modify" orders previously made under sub-section (b) of Section 11 of

the Act, and did not apply to an order which denied revocation or modification, although the SEC had fully and completely reconsidered the prior order in the light of voluminous new evidence produced by responsible state regulatory body going to the question of changed conditions.

The construction placed on these vital sentences by the Court, we submit, is contrary to reasonable interpretation of the language, and is in opposition to the Legislative history in connection with this particular language.

The first sentence of the quoted paragraph grants to the Commission power, whether on its own motion or as the result of a party's motion, to issue an order revoking or modifying **any order** previously made under this entire sub-section (b) of Section 11 of the Act, commonly referred to as the "heart of the Act." The second sentence of the paragraph expressly makes **ANY** order made under this sub-section subject to judicial review. This last sentence of the paragraph does not limit the orders subject to judicial review only to those orders which are affirmative in nature, i.e., orders which **do** revoke or modify a previous order; clearly, without such a limitation, the sentence can only be reasonably interpreted to mean that orders, either affirmative or negative in nature, i.e., orders **refusing** to revoke or modify, are subject to judicial review.

To interpret this language otherwise would be illogical since it would give appellate review only to affirmative orders—orders upon which a moving party would need no review since the Commission would have granted the motion. On the other hand, if the interpretation placed upon this paragraph by the Court were

correct, there would be a necessary conclusion that the Congress intended that due process was to be denied in this particular instance. We say this because, if a moving party could show "conditions upon which the order was predicated" did not exist and the Commission arbitrarily or capriciously denied a motion to revoke or modify a previous order, then, under this Court's interpretation, the party offended by this arbitrary or capricious refusal would have no right to review and no recourse to appellate procedures to correct an arbitrary or capricious act by the Commission.

Although petitioner for rehearing did not in its original argument of this matter point out to the Court the Legislative history we note that the matter was before the Court through the brief of Louisiana Power on page 23 where the Congressional Record is quoted as follows:

(74th Cong., 1st Sess., Cong. Rec. 8946)

"Mr. Borah: 'In other words, **all these orders** which would be made with reference to reorganization and so forth would be appealable to the court.'

"Mr. Wheeler: 'Absolutely.'" (emphasis added)

Despite exhaustive research we find no other debate, reports, or other material which refutes or negates in any way this express intent of Congress, as stated by the Act's leading proponent.

III.

Lest the Court erroneously assume that the interests of the Louisiana Commission and Louisiana Power are identical in this matter, we wish to emphasize that the

interest of the Louisiana Commission is quite apart from and considerably greater than that of Louisiana Power. If the ordered disposition is consummated, Louisiana Power will undoubtedly obtain a price for its gas properties at least equal to the original cost less depreciation on which it is allowed to earn the rate of return fixed by this Commission, and probably more inasmuch as reproduction costs are much higher and the territory served is growing. Louisiana Power can invest such proceeds in other electric properties, since its present annual construction budget for electric properties far exceeds what it will obtain for the gas properties. On this re-investment Louisiana must, of course, be allowed to earn a fair rate of return.

CONCLUSION

The persons primarily here concerned, therefore, are the electric and gas customers whose interest it is the duty of this Commission to protect. The Louisiana Public Service Commission, therefore, says with all the earnestness at its command that its interest is not so much that of Louisiana Power and Middle South as it is that of protecting the public interest and the electric and gas consumers. In this interest, we earnestly urge that this Court reconsider this matter and grant the Louisiana Commission a rehearing so that this case may be remanded to the SEC for further proceedings.

STAY OF MANDATE

Should the delays for filing this petition expire in vacation or the Court fail to act upon this petition prior to vacation, for the reasons hereinabove set forth it is respectfully requested that the Court should stay its

mandate in this case until disposition of the petition for rehearing.

Respectfully submitted,

ROBERT A. AINSWORTH, JR.,
*Counsel for Petitioner,
Louisiana Public Service
Commission.*

Of Counsel:
AINSWORTH & AINSWORTH,
1650 National Bank of Commerce Building,
New Orleans, Louisiana.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Robert A. Ainsworth, Jr.,
*Counsel for Petitioner,
Louisiana Public Service
Commission.*